## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATUTES AND REGULATIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 3 |
| REASONS WHY THE WRIT SHOULD BE GRANTED | 8 |
| The Question Is Important | 8 |
| The Question Is Substantial | 14 |
| The Board's Criteria | 14 |
| The Necessity for a Hearing | 25 |
| The Absence of Substantial Evidence | 30 |
| CONCLUSION | 32 |
| APPENDIX | |
| Relevant Statutes | 1a |
| Relevant Regulations | 3a |
| Judgment of the Court | 13a |
| Order of the Civil Aeronautics Board | 17a |


### CASES CITED


Air Dispatch, Inc. v. United States, 237 F. Supp. 459 (E.D. Pa. 1964), aff'd 381 U.S. 412 (1964) ...18, 21, 22

American Airlines, Inc. v. Civil Aeronautics Board, 359 F. 2d 624 (D.C. Cir. 1966), cert. denied 17 L.Ed. 2d 75 (1966) .....10, 26, 27, 28

Atchison, T. & S.F. Ry. v. United States, 244 F. Supp. 955 (N.D. Ill. 1965), Nos. 57 and 59, October Term 1966, *sub nom.* American Trucking Assns. v. Atchison, T. & S.F. Ry. ..... 22

Page

Central Truck Lines, Inc. v. Pan-Atlantic S.S. Corp., 82 M.C.C. 395 (1960), aff'd *sub nom.*, Sea-Land Service, Inc. v. United States, 222 F. Supp. 558 (D. Del. 1963) ..... 29

City of Philadelphia v. Civil Aeronautics Board, 289 F. 2d 770 (D.C. Cir. 1961) ..... 22

Commercial Zones and Terminal Areas, 54 M.C.C. 21 (1952) ..... 29

Eastern Central Motor Carriers Assn., Inc. v. United States, 321 U.S. 194 (1944) ..... 32

Kenny Extension—Air Freight, 61 M.C.C. 587 (1953).. 15

Law Motor Freight, Inc. v. Civil Aeronautics Board, 364 F. 2d 139 (1st Cir. 1966), petition for cert. filed January 20, 1967, 35 U.S. L. Week 3259 (Jan. 31, 1967) (No. 989) .....8, 12, 19, 20, 21, 22, 23, 25, 26, 28, 29, 30, 31, 32, 33

Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71 (1964) ..12, 13, 14, 17, 18, 19

National Motor Freight Traffic Assn., Inc. v. United States, 372 U.S. 246 (1963) ..... 3

New York, N. Y. Commercial Zone, 88 M.C.C. 336 (1961) ..... 29

Northeast Airlines, Inc. v. Civil Aeronautics Board, 331 F. 2d 579 (1st Cir. 1964) ..... 32

Panther Cartage Co. Extension—Air Freight, 88 M.C.C. 37 (1961) ..... 12

Peoples Express Co. Extension of Operation—Air Freight, 48 M.C.C. 393 (1948) .....13, 14

Sea-Land Services, Inc. v. United States, 222 F. Supp. 558 (D. Del. 1963) .....20, 21, 29

St. Louis, Mo.—East St. Louis, Ill. Commercial Zone, 61 M.C.C. 489 (1953) ..... 29

Wycoff Co., Inc. v. United States, 240 F. Supp. 304 (D. Utah 1965) ..... 22

STATUTES

Federal Aviation Act of 1958 Page

Section 102 (49 U.S.C. § 1302) ..... 9
Section 403(a) (49 U.S.C. § 1373(a)) ...2, 4 n.1, 5, 9, 11, 16, 17, 25
Section 1003 (49 U.S.C. § 1483) .....18 n. 7
Section 1006 (49 U.S.C. § 1486) ..... 7

Interstate Commerce Act

Section 5a (49 U.S.C. § 5b) ..... 3
Section 202(c) (49 U.S.C. § 302(c)) ..... 20
Section 203(b)(7a) (49 U.S.C. § 303(b)(7a)) 5, 8, 15, 16, 17
Section 216 (49 U.S.C. § 316) ..... 3

Judicial Code of the United States

Section 1254(1) (28 U.S.C. § 1254(1)) ..... 2

REGULATIONS

Civil Aeronautics Board

Section 221 (14 C.F.R. § 221) ..... 14
Section 222 (14 C.F.R. § 222) ...2, 8, 11, 14, 15, 16, 19, 22, 23, 24, 25, 26, 27, 33
Section 222.2 (14 C.F.R. § 222.2) ..... 25
Section 222.3 (14 C.F.R. § 222.3) ....11, 12, 26, 33
Section 22.3(a) (14 C.F.R. § 222.3(a)) ..4, 5, 6, 22, 23, 25, 26, 27
Section 222.3(d) (14 C.F.R. § 222.3(d)) ..7, 11, 25, 26, 27, 28

Interstate Commerce Commission

Section 210.40 (49 C.F.R. § 210.40) ..... 33
Section 210.40(a) (49 C.F.R. 210.40(a)) ..17, 18, 19
Section 210.40(c) (49 C.F.R. § 210.40(c)) .... 19

OTHERS

Air Transport Facts and Figures, 1966 ..... 9

CAB Chart Book of Airline Economic Trends, Vol. 1, No. 1 (Nov. 1966) ..... 9

Davis, Administrative Law Treatise, Vol. I § 7.03 .... 30

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

---

No.

---

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. and UNITED MOTOR FREIGHT, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

*To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

National Motor Freight Traffic Association and United Motor Freight, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on December 6, 1966.

## OPINIONS BELOW

The Court of Appeals wrote no opinion. It's judgment appears in Appendix hereto, p. 14a. The Opinion and Order of the Civil Aeronautics Board affirmed by the Court of Appeals appear in Appendix hereto, p. 17a.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code. The judgment of the Court of Appeals was entered on December 6, 1966. No petition for rehearing was filed.

## QUESTIONS PRESENTED

1. Has the Civil Aeronautics Board employed lawful criteria to determine whether or not motor common carriage of property can be authorized and regulated by it as pickup and delivery service in connection with air transportation within the meaning of Section 403(a) of the Federal Aviation Act and Part 222 of its Economic Regulations?

2. May the Civil Aeronautics Board grant an application by an air carrier for authority to perform the motor common carriage of property upon a finding that such transportation is truly pickup and delivery service in connection with air transportation when the finding is based solely on allegations of fact in the application and is made in the face of objections and a request for hearing by competing common carriers, which objections and request join issues of fact?

3. Are the findings of the Civil Aeronautics Board that the motor common carriage it authorized is truly pickup and delivery service in connection with air transportation supported by substantial evidence?

## STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, the Federal Aviation Act, the Administrative Procedure Act, and of the regulations of the Interstate Commerce Commission and the Civil Aeronautics Board are set forth in Appendix hereto, p. 1a *et seq.*

## STATEMENT OF THE CASE

Petitioner National Motor Freight Traffic Association (NMFTA) is a non-profit membership corporation whose members are some 4,000 common carriers of property by motor operating in interstate and foreign commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Pursuant to Section 5a of the Interstate Commerce Act, 49 U.S.C. Section 5b, NMFTA is the agency by which its members collectively discharge their duty under Section 216 of that Act, 49 U.S.C. § 316, to establish and maintain lawful classifications of property and lawful rules, regulations and practices governing the transportation they perform. As this Court held in *National Motor Freight Traffic Association* v. *United States,* 372 U.S. 246, 247 (1963), NMFTA performs "significant functions in the administration of the Interstate Commerce Act" and has standing to represent its members in judicial proceedings in which the validity of the actions of administrative agencies is at issue.

Petitioner United Motor Freight, Inc., a member of NMFTA, is a motor common carrier performing the transportation of property in interstate and foreign commerce under a certificate of public convenience and necessity issued by the Interstate Commerce Commission. As here pertinent, United's certificate authorizes

carriage between Flint, Michigan and Willow Run and Metropolitan Airports, which serve Detroit, Michigan, but restricts United to the carriage of property having an immediately prior or an immediately subsequent movement by air.

On June 15, 1964 Emery Air Freight Corporation, an indirect air carrier, i.e., an air freight forwarder, filed an application under Section 222.3(a) of the Economic Regulations of the Civil Aeronautics Board, 14 C.F.R. 222.3(a), Appendix, p. 11a, for authority to perform the motor common carriage of property between the Detroit Airports and Flint.[1] The application recited that, although Flint is served through its own airport by air carriers certificated by the Board to so serve it, their service is limited; that most of the flights to and from Flint are via Detroit; that Detroit is as convenient to reach from Flint "by surface transportation as it is by air"; that because all flights to and from Flint's airport via Detroit use Willow Run Airport, while most flights between Detroit and other cities use Metropolitan Airport, most freight flown into or out of Flint must be shuttled between Willow Run and Metropolitan Airports; that the use of air transportation between Detroit and Flint is therefore discouraged, as illustrated by instructions to Emery from "one of the largest firms in Flint" to terminate its incoming air traffic at Detroit and forward it by motor

[1] Procedurally the application sought authority to file a tariff naming Flint as a point in Emery's Detroit pickup and delivery zone. However, since Section 403(a) of the Federal Aviation Act, 49 U.S.C. § 1373a, Appendix, p. 1a, forbids the performance of any transportation not provided for in tariffs, the effect of granting the application was to authorize Emery to perform transportation that it could not otherwise lawfully perform without authority from the Interstate Commerce Commission.

carrier to Flint; that Emery had removed Flint from its tariffs as a point served by it and was terminating all of its traffic to Flint at Detroit for motor carriage beyond; that Emery desired to add Flint to its Detroit pickup and delivery area "to co-ordinate and control the Detroit-Flint surface movement"; and that this "would be a bona fide pickup and delivery operation in all respects and would serve to develop, as no other method could, Flint's full cargo potential." (Record, pp. 1-2).

On July 6, 1964 NMFTA moved the Board to dismiss Emery's application for failure to supply the economic data and other facts required by Section 222.3(a) of the Board's Regulations, or, alternatively, to set the application for hearing (Record, p. 5 *et seq.*). On September 28, 1964, in response to the Board's *ex parte* request, Emery filed an amendment to its application in which it said that it intended to render service only within the corporate limits of Flint, and to use straight trucks with a capacity of 5,000 pounds; that the service would be a "special service for Flint" since it does not provide service at nearby locations; and that its rate would be $1.75 per hundred pounds, subject to a minimum of $3.50 (Record, p. 13).

On March 25, 1965 NMFTA renewed its motion to dismiss Emery's application (Record, p. 17) on the grounds, *inter alia,* that the proposed motor common carriage was not "incidental to transportation by aircraft" within the meaning of Section 203(b)(7a) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(7a), Appendix, p. 1a, and thus not a service "in connection with" air transportation within the meaning of Section 403(a) of the Federal Aviation Act, 49 U.S.C.

§ 1373(a), Appendix, p. 1a; that the carriage was therefore beyond the jurisdiction of the Board to authorize Emery to perform; and that the amended application violated Section 222.3(a) of the Board's Regulations in that it set forth no economic data or other facts to establish that the proposed carriage would be truly pickup and delivery service. NMFTA also renewed its alternative request for a hearing, which it supported with an affidavit by the Treasurer of United (Record, pp. 32-36), which was quoted in part in Circuit Judge Fahy's dissenting opinion as follows (Appendix, p. 15a):

> "Since the operating authority of United Motor Freight is limited to the handling of air freight its success depends on its ability to do what it has done, namely, gear its operations to the specific needs of shippers and receivers of air freight. This specialized service is nevertheless line haul service. The cities of Lansing, Jackson, Owosso and Flint could not be adequately, economically or efficiently served in pick up and delivery operations. One hallmark of pickup and delivery of less-than-truckload shipments is their movement from point of receipt by the carrier to point of delivery by that carrier without consolidation with other shipments, i.e., without 'terminalling.' The distance from Flint to the Detroit airports is too great to permit this to be done economically or efficiently as a matter of routine. Hence, apart from the fact that Flint is in no sense within the bounds of the commercial zone or terminal area of Detroit, air freight shipments to and from Flint are and must be handled as line haul movements."[2]

---

[2] Emery's application claimed that Flint is "approximately 45 miles" from Detroit. But the affidavit of United's Treasurer gives the distance between Flint and the Detroit airports as 65 or 80 miles, depending on the route used (Record, p. 33). See dissenting opinion of Judge Fahy (Appendix, p. 14a).

On December 6, 1965 the Board, reciting that it had "carefully reviewed the Emery application and the objections thereto" and considered "all relevant facts", issued an order granting Emery's application (Appendix, p. 17a). Thereupon, Petitioners, pursuant to Section 1006 of the Federal Aviation Act, 49 U.S.C. § 1486, filed their petition to review the Board's order in the United States Court of Appeals for the District of Columbia Circuit. On December 5, 1966 the Court, per curiam and without opinion, entered the following judgment (Appendix, p. 14a):

> "This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.
>
> "ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the Civil Aeronautics Board on review herein is affirmed. See Law Motor Freight v. CAB, Inc., (sic) No. 6731 1st Cir., July 20, 1966."

Judge Fahy dissented on the ground that Section 222.3(d) of the Board's Economic Regulations, 14 C.F.R. 222.3(d), Appendix, p. 12a, requires a finding that the service proposed is "a pickup and delivery service as distinct from a line haul service", and that a controversy over the nature of the service arose when Petitioners, supported by United's affidavit, challenged "the claim of Emery that the tariff was for a good faith pickup and delivery service and not a service which in fact could be furnished only by a line haul operation." (Appendix, p. 15a). Judge Fahy also pointed out that United had "brought to the Board's attention that the ICC, acting under comparable statutory provisions, had held that service between Detroit Airports and Flint was not 'incidental to transporta-

tion by aircraft' and therefore was not exempt from the Commission's certification requirements." (Appendix, p. 16a, footnote omitted).

## REASONS WHY THE WRIT SHOULD BE GRANTED

### The Question Is Important

This case and its companion here, *Law Motor Freight, Inc., et al.* v. *CAB,* October Term, 1966, No. 989, are of first impression in this Court and the Courts below, and are the first in which the Civil Aeronautics Board granted applications by air carriers to perform motor common carriage under Part 222 of its Economic Regulations. As the Board itself said in answer to an inquiry as to the status of the applications, "these are pilot cases [that] present new policy questions with no precedent for guidelines." (Record, p. 64). The Board's resolution of the "new policy questions" and the interpretation and application of the Federal Aviation Act and its regulations thereunder on which its resolution rests will have a far reaching impact upon the public, upon the relationship between air carriers and surface carriers, upon the division of regulatory authority between the Board and the Interstate Commerce Commission, and hence upon the future of the nation's transportation system.

The basic problem in both cases stems from the fact that the economic regulation of motor common carriage in interstate and foreign commerce was delegated by the Congress in part to the Interstate Commerce Commission and in part to the Board. Thus the Commission has economic regulatory authority over motor common carriage except that which is "incidental to transportation by aircraft." Interstate Commerce Act, Section 203(b)(7a), 49 U.S.C. § 303(b)(7a), Appendix, p. 1a. The Board has economic regulatory au-

thority over motor common carriage by air carriers that is rendered as part of their "services in connection with such air transportation" as it has authorized them to perform. Federal Aviation Act, Section 403(a), 49 U.S.C. § 1373(a), Appendix, p. 1a. Both the Commission and the Board have plenary authority within their respective jurisdictions, i.e., authority to control entry into the business of carriage and authority to prescribe the terms, conditions and rates which those licensed to enter the business must observe.

The seeds of inter-agency conflict contained in this division of authority between the Commission and the Board lay more or less dormant as long as the transportation of freight by air was of little practical significance, which was the case until recently. Thus, in 1956 the total freight traffic of all air carriers certificated by the Board was only .45 billion ton miles. But by the year 1961 it had risen to 1 billion ton miles, and for the 12 months ending June 30, 1966 it was 2.6 billion ton miles, which was an increase of 40 percent over the 12 months ending June 30, 1965. *CAB Chart Book of Airline Economic Trends,* Vol. 1, No. 1, Nov. 1966, Chart 14, pp. I-27, I-28. And the tons of domestic air freight emplaned at 20 major cities increased 63 percent from 1955 to 1960 and 90 percent from 1960 to 1965. With these increases has come a broadening of the consist of the traffic. Thus, in 1955 ten commodities accounted for 80 percent of the tonnage. In 1965 ten commodities accounted for slightly over 50 percent of the tonnage. Air Transport Association of America, *Air Transport Facts & Figures,* 1966, p. 13.

Moreover, the Board reads the declaration of policy in Section 102 of the Federal Aviation Act, 49 U.S.C. 1302, as requiring it to promote air transportation at

the expense of surface transportation. For example, in 1964 it approved so-called blocked space service by all-cargo air carriers because a "large volume of traffic now moved on surface carriers will become available if air carriers achieve a break-through in properly servicing such traffic" and it considered that "its statutory responsibility to promote air transportation required it to pursue earliest possible achievement of the breakthrough." *American Airlines, Inc.* v. *CAB,* 359 F. 2d 624, 626-627 (D.C. Cir. 1966); cert. den., 17 L. Ed. 2d 75 (1966).[8]

The most recent promotional effort of the Board was its sponsorship, jointly with the National Industrial Traffic League, a nationwide organization of shippers, of a series of so-called air cargo workshops, which were meetings among air carriers, shippers and personnel of the Board convened in 1966 in various strategically located cities throughout the country for the purpose of fostering the greater use of air carriers in the transporation of freight. As the Chairman of the Board said in his address to the fourth such workshop, held in Chicago, Illinois in October of 1966:

> "I think it would be appropriate to mention three words which recur rather persistently in the declaration of policy which begins the statute under which the Board operates. These three words are: promotion, encouragement, development. We take these words, and all that they ask for, very seriously."

---

[8] Blocked space service is the carriage of property at wholesale rates applicable only when the user reserves and agrees to pay for a specified amount of space on a regularly recurring basis for a period of at least 60 days. *American Airlines, supra,* at p. 625, fn. 2.

We do not challenge the right of the Board to administer the Federal Aviation Act so as to promote air transportation. We do challenge the right of the Board to promote the welfare of air carriers by authorizing them to engage in motor transportation in competition with motor carriers regulated by the Interstate Commerce Commission in disregard of the limitations on the Board's powers contained in that Act. Part 222 of the Board's Economic Regulations and its orders under Section 222.3 thereof demonstrate that it is doing just this. Thus, in the Preamble to Part 222, Appendix, p. 6a, at p. 8a, after noting that the "full development of air cargo transportation depends, in large measure, upon efficient surface transportation", the Board goes on to say that effective surface transportation can best be guaranteed when the direct air carriers and the air freight forwarders control it, either by operating their own trucks or employing local cartagemen as their agents.

True enough, the Preamble to the Regulations recites that motor transportation by air carriers constitutes "services in connection with" air transportation within the meaning of Section 403(a) of the Federal Aviation Act only if it is "truly air cargo pickup and delivery . . . as distinguished from line-haul or over-the-road surface transport." Appendix, p. 9a. And Section 222.3(d) of the Regulations themselves provides that applications by air carriers for authority to perform motor carriage will not be approved unless the Board makes a "finding that the proposed tariff involves service in connection with air transportation." However, as we shall show, the overriding basis for such findings is the Board's policy to put the motor transportation of traffic moving partly by air and partly by motor in the hands of the air carriers.

Interestingly enough, the direct air carriers, the only carriers who actually operate aircraft and haul freight, do not seem to share the Board's view that control of the surface carriage that precedes and follows air carriage must be in their hands. All of the applications filed under Section 222.3 of the Board's regulations to date have been by indirect air carriers, i.e., air freight forwarders. Moreover, in the proceedings before the Interstate Commerce Commission in which its regulations discussed *infra* were promulgated, Air Cargo, Inc., the agent of most of the direct air carriers charged with arranging for motor service for them, supported the rationale of *Panther Cartage Co. Extension—Air Freight,* 88 M.C.C. 37 (1961), in which the Commission had held that motor carriage by or for air freight forwarders could be considered exempt from regulation by it only if confined to the terminal areas of the direct air carriers. See *Motor Transportation Of Property Incidental To Transportation By Aircraft,* 95 M.C.C. 71, 78, 82 (1964).

To date the Board has granted six applications filed by air freight forwarders under Section 222.3 of its Regulations. Two of its orders are before this Court. The four others are before the United States Court of Appeals for the District of Columbia Circuit, being held in abeyance to abide the decision of this Court in this case. In all six the Board grounded its orders on the rationale of this case, namely: (1) that the cities to which the air forwarders proposed to render motor service either have no air service, as in *Law* (Pet. for Cert. in No. 989, Appendix, p. 26a), or have a lesser volume of air service, as in this case; (2) that those points should have "the full advantages inherent" in the greater air service available

at major points; and (3) that "only by permitting an integrated air-surface movement under single carrier responsibility will those advantages be afforded present and potential users of air cargo service." Appendix, p. 17a at p. 20a.

Using this rationale the Board has authorized air freight forwarders to render motor service between Detroit and Flint, a distance of 65 or 80 miles, depending on routing; between Cleveland and Akron, a distance of 34 miles; between Cleveland and Canton, a distance of 57 miles; between Cleveland and Youngstown, a distance of 67 miles; between Terre Haute and Indianapolis, a distance of 71 miles; between Kansas City, Missouri and St. Joseph, Missouri, a distance of 47 miles; and between Dallas and points as much as 46 miles distant.[4]

In every case the practical effect of the Board's action is to license air freight forwarders to render line-haul motor common carriage in competition with motor common carriers rendering service pursuant to certificates of public convenience and necessity from, and under regulation by, the Interstate Commerce Commission. Motor operations extending "into the territory adjacent to, and served primarily by, another airport clearly take on the character of interterminal line-haul service *in substitution for, rather*

[4] *Supra*, p. 6, fn. 2; Order E-24231 in Dockets 15581 and 15582 and Order E-24232 in Dockets 15664 and 15665, both issued September 27, 1966, and both before the United States Court of Appeals for the District of Columbia Circuit *sub nom. National Motor Freight Traffic Association, et al.* v. *C.A.B.*, Nos. 20595 and 20596. Mileages are short highway miles as shown in Household Goods Carriers Bureau Mileage Guide No. 8, filed with the Interstate Commerce Commission September 20, 1966 as Tariff MF-ICC No. 139.

*than incidental to, air transportation." Peoples Express Co. Extension of Operation—Air Freight,* 48 M.C.C. 393, 396 (1948); quoted with approval and with the emphasis in *Motor Transportation Of Property Incidental To Transportation By Aircraft, supra,* 95 M.C.C. at 75. Moreover, the Board's actions create competition for local service air carriers such as those rendering service between Flint and Detroit, Cleveland and Akron/Canton, Cleveland and Youngstown, Indianapolis and Terre Haute, and Kansas City and St. Joseph, most of which are able to operate only because they are directly subsidized by the United States.[5]

In short, the Board has embarked on a course that will have major ramifications on the nation's transportation system. Its decision to do so is certainly important enough to warrant review by this Court if, as we shall show, there is a legally substantial question of the Board's authority to do so.

## The Question Is Substantial

### The Board's Criteria

Until the Board promulgated Part 222 of its Economic Regulations it had no regulations governing the performance of motor common carriage by air carriers other than those contained in Part 221, 14 C.F.R. § 221 *et seq.,* which merely require air carriers to publish and file with the Board tariffs containing their

[5] Frontier Airlines, Inc. opposed the application for authority to render motor service between Kansas City and St. Joseph on the ground that substantial revenues would be diverted from it. Presumably the diverted revenues will be recouped from an increase in the subsidy to it, which the Board tells us was $5,780,000 in the fiscal year 1966.

rates and charges for such pickup and delivery service as they render. However, as a matter of administrative practice, the Board generally refused to accept for filing tariffs providing for pickup and delivery service at points more than 25 miles from the airport serving a particular city or from the corporate limits of the city itself. Preamble to Part 222 of Board's Economic Regulations, Appendix, p. 6a.[6]

Neither did the Interstate Commerce Commission have any regulations defining the scope of the exemption in Section 203(b)(7a) of the Interstate Commerce Act of motor carriage "incidental to transportation by aircraft." However, as a matter of administrative practice, it treated as within the exemption motor carriage in the pickup and delivery of air freight rendered by or for air carriers pursuant to their tariffs filed with the Board. *Hazel Kenny Extension —Air Freight,* 61 M.C.C. 587 (1953). As the Commission there stated, its practice was "based on the assumption that [the Board] would not hesitate to reject any [tariff] publication which would result in an unreasonable enlargement of [an air carrier's terminal] area." 61 M.C.C. at 596. Conversely, the Commission treated as subject to its regulation the motor carriage of air freight to points beyond the air carriers' terminal areas, and accordingly issued numerous certificates of public convenience and necessity restricted, as is that of Petitioner United, to the motor common carriage of property having an immediately prior or an immediately subsequent movement by air.

[6] At the major points of New York, Chicago and Los Angeles the Board accepted for filing tariffs providing for pickup and delivery service at points somewhat more than 25 miles from their city limits.

On August 21, 1961 the Board instituted a rule making proceeding on proposed rules which contemplated its acceptance of pickup and delivery tariffs of air carriers providing for service within 50 miles of any point receiving air service, and within any other zone that might be specifically established by the Board at major points. Preamble to Part 222 of the Board's Economic Regulations, Appendix, pp. 6a-6b. Petitioner NMFTA and others thereupon petitioned the Interstate Commerce Commission to institute a rule making proceeding to determine the areas within which the motor carriage of air freight could be considered incidental to transportation by aircraft and hence exempt from economic regulation by the Commission, and simultaneously asked the Board to hold its proceeding in abeyance pending action by the Commission. On October 4, 1961 the Commission instituted the proceeding NMFTA had asked it to institute.

The two proceedings culminated in the spring of 1964 when the Commission and the Board simultaneously published in the Federal Register what the Board has styled "complementary" regulations (Appendix, pp. 3a-12a) designed, as it stated in the Preamble to its Regulations, to avoid "undue conflict between what the Board considers 'service in connection with . . . air transportation' and what the Commission considers service 'incidental to transportation by aircraft.'" Appendix, p. 6a at p. 7a. To achieve what the Board called "a practical accommodation" between the two agencies, it and the Interstate Commerce Commission promulgated a single basic standard for determining whether motor transportation is a service "incidental to transportation by aircraft" within the meaning of Section 203(b)(7a) of the Interstate Com-

merce Act and therefore a "service in connection with . . . air transportation" within the meaning of Section 403(a) of the Aviation Act.

Thus, the Commission's Regulations define the transportation of property which is "incidental to transportation by aircraft" as that which ". . . is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier or air freight forwarder (indirect air carrier) providing the line-haul transportation . . . ." 49 C.F.R. 210.40(a), Appendix, p. 3a. The Board adopted the same standard for determining whether motor carriage is service "in connection with" air transportation. Thus, it said in the Preamble to its Regulations that whether the movement of air freight by truck constitutes "service in connection with air transportation" depends on whether it is "truly air cargo pickup and delivery . . . as distinguished from line-haul or over-the-road surface transport." Appendix, p. 9a. And in the very order Petitioners here challenge, the Board said (Appendix, p. 20a):

> "Part 222 is designed to provide a fair and workable procedure for considering, on a case-by-case basis, requests by direct air carriers or air freight forwarders for extension of pick-up and delivery services to points beyond the area covered by existing tariffs, or the established 25-mile rule-of-thumb terminal area. The ultimate question to be resolved in each individual case under such procedure is whether the service proposed by the air carrier is truly pick-up and delivery in nature, or whether it is, in fact, a line-haul operation."

The Commission's decision promulgating its regulations, *Motor Transportation of Property Incidental to*

*Transportation by Aircraft,* 95 M.C.C. 71 (1964), was judicially reviewed and affirmed *sub nomine Air Dispatch, et al.* v. *United States,* 237 F. Supp. 450 (E.D. Pa. 1964), affirmed per curiam 381 U.S. 412 (1964). The gravamen of the judicial attack, mounted by the air freight forwarders, was that the Board had exclusive jurisdiction to determine "when motor carrier transportation is a part of air transportation" and therefore exempt from regulation by the Commission. 237 F. Supp. at 451. The District Court's opinion makes clear that the respective jurisdictions of the Board and the Commission are mutually exclusive. In other words, the motor transportation of air freight is regulated either by the Board or by the Commission, but not by both.[7] In an *amicus* memorandum, filed at the request of the Court, the Board agreed that the determination of the scope of motor carriage exempt from regulation by the Commission and therefore under regulation by the Board was to be made by the Commission, and that "the regulations of the two agencies were adopted in an effort to reach a practical accommodation with respect to the problems involved." Motion to Affirm in No. 1004, Oct. Term 1964, p. 4.

The practical accommodation effected was this: The Board, as we've seen, undertook to confine motor carriage by air carriers to true pickup and delivery service within reasonable terminal areas. The Commission exempted from its regulation motor carriage authorized by the Board as true pickup and delivery service within terminal areas described in tariffs accepted by

[7] A partial exception not pertinent here is air-motor service at joint through rates authorized by Section 1003 of the Federal Aviation Act, 49 U.S.C. 1483, which rates must be filed with both the Board and the Commission and are regulated by a joint CAB-ICC Board.

the Board. 49 C.F.R. § 210.40(a), Appendix, p. 3a. In other words the Commission delegated to the air carriers and the Board the authority to fix air terminal areas within which motor carriage would be exempt from regulation by the Commission. However, noting that the geographical limit of the exemption at any given point would expand automatically were the Board to "allow carriers to extend the area in which they offer terminal services", the Commission provided (49 C.F.R. § 210.40(c), Appendix, p. 4a) for the institution of proceedings "looking toward the definition of the geographical extent" of the exemption at any particular point, in which proceeding the prior action of the Board "allowing air carriers to publish extended terminal service tariffs would be considered but would not be determinative." 95 M.C.C. at 87.

Obviously, this scheme of complementary regulations requires that both the Board and the Commission employ the same basic criteria for determining whether particular motor transportation is truly pickup and delivery as distinguished from line-haul service. The Board "anticipates . . . that the ICC will give due and appropriate weight to the Board's findings that the contemplated services are truly air cargo pickup and delivery in nature." Preamble to Part 222 of the Board's Economic Regulations, Appendix, p. 6a at p. 10a. As the First Circuit put it in *Law* (Pet. for Cert. in No. 989, Appendix, p. 23a):

> "The Board has promulgated its philosophy and its procedures in concert with the Interstate Commerce Commission. The system, devised to avoid interagency conflict while preserving agency sovereignty, is to give the Board the first judgment, which shall be given non-conclusive respect by I.C.C."

It is perfectly plain that there can be neither a practical accommodation nor the avoidance of interagency conflict unless motor carriage incidental to transportation by aircraft is the same thing as motor carriage in connection with air transportation. The Commission can't give "due and appropriate weight" to the Board's findings unless they are addressed to the criteria the Commission employs. The two agencies can't play the same game under different rules. As the General Counsel of the Commission said in a letter commenting, at the request of the Department of Justice, on the Board's order in this case:

> ". . . basic to both Sections 403 and 203(b)(7a) is a determination of whether Emery is performing a bona fide pickup and delivery service. If it is performing such a service, then its motor carrier operation will be both, 'in connection with' air transportation (under Section 403(a) of the Aviation Act) and 'incidental' to transportation by aircraft (under Section 203(b)(7a) of the Interstate Commerce Act.)" (Letter dated March 28, 1966 from Robert W. Ginnane to Howard E. Shapiro, Assistant Chief of the Appellate Section of the Anti-Trust Division, Appendix B to the Board's Brief to the Court of Appeals).

Nevertheless, the Board takes the position that the Federal Aviation Act and its regulations permit it to differentiate between line-haul service and pickup and delivery service without regard to the criteria established by the Commission in its part of the "complementary" regulations, and long established for determining whether motor carriage by or for railroads, water carriers and surface freight forwarders is "incidental" to their service within the meaning of Section 202(c) of the Interstate Commerce Act, 49 U.S.C. 302(c), and therefore exempt from economic regulation as motor carriage. Those criteria have been judi-

cially approved, most recently in 1963 in *Sea-Land Services, Inc.* v. *United States,* 222 F. Supp. 558 (D. Del.). The theory is, in the words of the First Circuit in *Law* (Pet. for Cert. in No. 989, Appendix, p. 24a), that each agency has power "to determine, for its purposes, what is 'in connection with' or 'incidental to' air transportation." As the Board put it, "no purpose would be served by speculating" whether the Commission would determine that the motor carriage it authorized here is exempt from its regulation because the Board's action "is not intended to reflect any views on whether applicant or its motor carrier agent requires additional authority from the ICC or other regulatory agencies." Appendix, p. 21a.

This theory—that the motor transportation of air freight may be licensed and economically regulated by both agencies—makes nonsense of the "complementary" regulations and obliterates the Congressionally established division of authority between the Board and the Commission. As we have seen, the Congress has given the Commission plenary economic regulatory authority over motor transportation that is not incidental to transportation by aircraft and has given the Board plenary economic regulatory authority over motor transportation that is a service in connection with air transportation. It certainly did not intend that both the Commission and the Board exercise their respective authorities over the same transportation, i.e., that both determine whether or not a particular person should be authorized to render a particular service, and, if so, on what terms and conditions and at what rates. This would inevitably create interagency conflicts. Moreover, the conflicts would stem from differences in regulatory standards and policies which each

agency has broad discretion to formulate and apply. Hence they could not be judicially resolved without casting the courts in the role they cannot play, namely that of a super administrative agency.

The three cases relied upon by *Law* are wholly inapposite. *Air Dispatch, supra,* and *Wycoff Co., Inc.* v. *United States,* 240 F. Supp. 304 (D. Utah 1965), held no more than that the Commission had power to determine the reach of the exemption of transportation incidental to transportation by aircraft. *In City of Philadelphia* v. *C.A.B.,* 289 F. 2d 770 (D.C. Cir. 1961), the Board merely held that a direct air carrier would be complying with its obligation under its certificate to render adequate air transportation at Philadelphia, notwithstanding that it chose to serve it through the Newark airport and to substitute motor service between the Philadelphia airport and the Newark airport for air service at the Philadelphia airport. The Board no more authorized or required the air carrier to perform motor carriage between Newark and Philadelphia as true pickup and delivery to be regulated by it under the Federal Aviation Act as a service "in connection with" air transportation than the Commission authorized or required motor carriers to perform rail carriage when it authorized them to substitute rail service for over-the-road service for part of their line-hauls. See *Atchison, T. & S. F. Rwy. et al.* v. *U. S.,* 244 F. Supp. 955 (N.D. Ill. 1965), Nos. 57 and 59, Oct. Term 1966, *sub nom. American Trucking Assns.* v. *Atchison, T. & S. F. Rwy. et al.* In both cases the substituted service is in law what it is in fact—in the first case motor service to be regulated under Part II of the Interstate Commerce Act, in the second case rail service to be regulated under Part I of that Act.

Assuming *arguendo* that Part 222 of the Board's Regulations do not contemplate that it employ the same criteria the Commission employs, they do contemplate the delineation of an area or zone around an airport city within which motor transportation will be truly pickup and delivery. The Preamble to Part 222 speaks throughout in terms of pickup and delivery areas. And Section 222.3(a) provides for the filing of applications "entitled 'Application for Tariff-filing Authority: Pickup and Delivery Zone.'" Hence, the Board was required to find here as *Law* held, albeit erroneously, that it did find there, "a sufficient nexus between" the airport city and the outlying points proposed to be served. Equally obviously, such a finding can only be made on the basis of facts respecting the economic and commercial relationship of the airport city and the outlying points. No such facts were adduced in this case.

As we've seen, a principal basis of the Board's order was Flint's allegedly inadequate air service. But the adequacy *vel non* of air cargo service at a particular point, while of overriding importance in determining whether carriers should be required to improve service or whether additional carriers should be authorized to render service, is irrelevant on the issue whether the motor transportation of air cargo to and from that point is truly pickup and delivery as distinguished from line haul carriage. The soundness of this is self-evident. Were absence or inadequacy of air service a basis for finding a proposed motor service to be pickup and delivery, the distinction between pickup and delivery and line haul transportation would be obliterated, and the Board could authorize, as a service "in connection with" air transportation, motor

carriage to any point to which an air carrier desired to render it.[8]

The Board also treated as a principal criterion in passing upon Emery's application, not the geographic and economic relationship of Detroit and Flint, but the manner in which Emery said it intended to render service. Indeed, only after Emery, in answer to the Board's request (R. 61), stated that it would use straight vans with a capacity of 5,000 pounds and that its charge would be $1.75 per hundredweight, was the Board willing to act on the application. These two representations, coupled with the finding that Emery's operations would be coordinated with the schedules of the air carriers, are the basis of the Board's order.[9] These representations are irrelevant. The size of the equipment a carrier uses depends on the volume of traffic and size of individual shipments tendered to it for transportation. The charges it makes depend on its costs of operation and the value of its service to its customers. As for coordination of operations, every carrier must coordinate its operations with its customers' needs. Thus, it was pointed out in the affidavit in this case that since

---

[8] Could it be tenably argued that because Dallas, Texas is not a deep water port the motor carriage of water-borne freight between Dallas and the Port of Houston is pickup and delivery to be regulated as a service in connection with or incidental to water carriage?

[9] This finding is without any support in the record. Emery's initial application alleged that: "Emery desires to add Flint to the Detroit pickup and delivery area to coordinate and control the Detroit-Flint surface movement." (R. 1). Respondent's request for additional information asked the following question, among others: "How will the schedule be coordinated with airline schedules?" (R. 61). Emery did not answer the question in its response to that request. (R. 13).

the "operating authority of [Petitioner United] is limited to the handling of air freight" it must and does "gear its operations to the specific needs of shippers and receivers of air freight."[10] (R. 35).

To treat as a governing criterion the manner in which Emery intends to render its particular service is wholly incompatible with Part 222 of the Board's Regulations. To begin with, the Board did not condition the grant of the application on Emery's even commencing, much less continuing, operations in the manner it proposed. But more fundamental is the fact that, under Section 222.2 of Part 222 (Appendix, p. 10a), the grant of Emery's application constitutes a finding that Flint is within the terminal area of Detroit for all air carriers serving Detroit, in other words, that all transportation of air freight by air carriers between Detroit and Flint is "truly pickup and delivery." Hence, if the Board's order is valid, any of them will be free to perform motor transportation whether or not they perform it in the manner Emery proposed. We submit that this makes it crystal clear that the Board has not employed rational criteria that are appropriate to the purpose and within the contemplation of the Federal Aviation Act and Part 222 of its Economic Regulations.

**The Necessity for a Hearing**

Coming to the second question presented, the necessity for a hearing, we start with the self-evident proposition that the Board has licensed Emery Air Freight Corporation to perform the motor transportation at issue. Under Section 403(a) of the Federal Aviation Act an air carrier regulated by the Board

---

[10] Emery is among the shippers and receivers of air freight using Petitioner United's service between Detroit and Flint. (R. 34).

may render only such service to the public as is provided for in tariffs filed with it in compliance with its regulations. Under Section 222.3(a) of those regulations Emery is required to file an application for authority to file a tariff providing for the performance of the motor transportation at issue. Under Section 222.3 (d) of those regulations Emery is forbidden to file such a tariff "unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation." Emery filed such an application and the Board granted it, thus enabling Emery to perform motor transportation that it could not otherwise lawfully perform. This action is plainly the issuance of a license.

The First Circuit recognized in *Law* that the Board's order "arguably meets the definition of 'license' in 5 U.S.C. § 1001(e): '. ... any agency permit, . . . approval, . . . or other form of permission'," and that "the same act may have characteristics of both rule making and licensing." However, it chose to "affix the 'rule-making' label" to the order "for the purpose of determining the applicable procedural requirements". In so doing it pointed to *American Airlines, Inc.* v. *C.A.B., supra,* affirming an order, entered without an evidentiary hearing, prohibiting combination air carriers from establishing so-called blocked space service.

Reliance on *American Airlines* is misplaced. It held that what the Board had done there was formulate a general rule on the basis of "broad policy considerations" rather than review individual conduct. 359 F. 2d at 629. In other words, the Board did there what it did when it promulgated Part 222 of its Economic Regulations, under Section 222.3 of which

Emery's application was filed, namely, issue an "agency statement of general . . . applicability and future effect designed to implement . . . or prescribe law or policy." 359 F. 2d at 630. In contrast, what it did here was review Emery's proposed individual conduct to determine whether or not it was permissible under the general rules previously promulgated as Part 222. Hence, what we have here is precisely what the Court held was not present in *American Airlines,* namely, action that "in substance and effect is individual in impact."[11] 359 F. 2d at 631.

Moreover, in this case, in contrast to *American Airlines,* the Board was called upon to resolve issues of "adjudicatory" as distinguished from "legislative" fact. This is clear from the Board's own pronouncements. The Preamble to Part 222 of its Economic Regulations states that it will consider applications such as that if granted here "in the light of whether the proposed service is truly air cargo and pickup and delivery . . . as distinguished from line-haul or over-the-road surface transport." Section 222.3(a) of Part 222 requires applications to state the reasons why service—"to [the] location(s) [to which service is proposed] is deemed appropriate and set forth economic data and other facts relied upon." Section

---

[11] As *Law* pointed out, under Section 222.2 of the Board's Regulations the effect of granting Emery's application is to authorize all other air carriers serving Detroit to perform motor transportation to and from Flint upon the filing of tariffs providing therefor. However, none has filed such a tariff. Furthermore, this does not make the Board's action any the less individual since a principal ground therefor was Emery's representations that the way in which it itself proposed to render service and the rates it itself proposed to charge made its own particular service pickup and delivery as distinguished from line-haul transport.

222.3 (d) provides that applications will be approved only if the Board makes a "finding that the proposed tariff involves service in connection with air transportation."

The Board held that there were no contested issues of fact, and hence that no purpose would be served by a hearing. As Judge Fahy pointed out in his dissent, this is not so. Emery's amendment to its application stated that it proposed "a special service for Flint" and "intended to utilize straight vans limiting the size of trucks to those with a capacity of 5,000 pounds." (R. 13). Petitioner United is now performing the motor transportation of air freight between Flint and the Detroit airports under a certificate of public convenience and necessity from the Interstate Commerce Commission limited to the transportation of property having an immediately prior or immediately subsequent movement by air carrier. (R. 32). Petitioners' pleading in response to Emery's application was supported by an affidavit of Mr. John Onderko, United's Treasurer, in which he took his oath that, in Judge Fahy's words (Appendix, p. 15a), Emery proposed "a service which in fact could be furnished only by a line haul operation."

Petitioners thereby specifically joined issue on one of the facts that the Board treated as controlling, namely, whether Emery could in fact render service between Flint and the Detroit airports as true pickup and delivery in straight vans with a capacity of 5,000 pounds in contrast to line-haul or over-the-road surface transport. Thus the Court below was not, as it was in *American Airlines,* "confronted solely with a broad conceptual demand for an adjudicatory-type proceeding." 359 F. 2d at 633).

The Court in *Law* makes the startling comment that to hold that a hearing is not required is consistent with the practice of the Interstate Commerce Commission in fixing commercial zones and terminal areas for surface carriers. The fact is that the Commission fixes such areas only on the basis of full findings of fact developed in proceedings designed to assure that all relevant evidence is adduced. Compare the findings of the Commission in *St. Louis, Mo.-East St. Louis, Ill., Commercial Zone,* 61 M.C.C. 489 (1953), upon which *Law* relies, with those of the Board here. Moreover, in *St. Louis* the Commission noted that when its "experience in motor carrier regulation was either negligible or considerably more limited" it held "formal hearings." 61 M.C.C. at 492. The Board here, by its own admission, is dealing with "pilot cases [that] present new policy questions with no precedent for guidelines." *Supra,* p. 8. Even now, after years of experience, the Commission holds adjudicatory hearings when they are necessary to assure an adequate record. See for example *New York, N.Y. Commercial Zone,* 88 M.C.C. 336 (1961); *Commercial Zones and Terminal Areas,* 54 M.C.C. 21 (1952). Furthermore, in cases in which the issue is whether a particular operation by a particular carrier is in fact pickup and delivery as distinguished from line-haul service adjudicatory hearings are invariably held. See for example, *Central Truck Lines, Inc.* v. *Pan-Atlantic S.S. Corp.,* 82 M.C.C. 395 (1960); affd. *sub nom. Sea-Land Service, Inc.* v. *U. S.,* 222 F. Supp. 558 (D. Del. 1963).

In any event, whether the Board's action was legislative or judicial is not determinative of the necessity for a hearing. As Professor Davis states

in his Treatise on Administrative Law, Vol. I, § 7.03, p. 416:

> "The proposition that a hearing is necessary for judicial action is . . . clearly false. Equally false is the converse proposition—that a hearing is never required for legislative or non-judicial action."

Professor Davis points out that there are numerous types of rule making, notably rate making, in which hearings are required notwithstanding the absence of any specific statutory requirements therefor. The reason is that an agency commonly acts judicially, i.e., adjudicates issues of fact, in legislative as well as in judicial proceedings. And it is the presence or absence of adjudicative facts, not the formal nature of the proceeding, which determines whether a hearing is necessary.

**The Absence of Substantial Evidence**

As for the third question presented, the evidence of record is obviously insufficient to permit a determination whether or not the service proposed is truly pick-up and delivery under any established or acceptable criteria for differentiating pickup and delivery from line-haul carriage. But even if what *Law* called the Board's "new formula" for making the determination be valid, there was not sufficient evidence here to permit the application of that formula.

*Law* described the Board's new formula as "a combination of reasonably close communities where service is rendered in smaller trucks, closely tied in with air schedules, and where rates are geared to the smaller shipments." Pet. for Cert. in No. 989, Appendix, p. 24a. Since the Court below wrote no opinion, but

simply cited *Law,* it must have approved that description.

Although the Court in *Law* characterized the record in that case as scant, general, sparse and thin, it concluded that it could not "*quite* say that the Board was clearly erroneous in finding sufficient evidence." Pet. for Cert. in No. 989, Appendix, p. 23a; Emphasis supplied. The record here is more scant, more general, more sparse and more thin. In this case Emery made no representation such as it made in *Law,* namely, that Nashua, New Hampshire "has a strong cultural, commercial and industrial affinity to Boston and the preponderance of its commerce moves via the Boston gateway." The Board here made no finding such as it made in *Law,* namely, that Nashua "has a strong community of interest with Boston." In short, the Board here neither could nor did find, as finding *Law* held necessary under its "new formula", "a sufficient nexus" between the airport city and the point proposed to be served.

Furthermore, in this case, as Judge Fahy pointed out in his dissent, Petitioners showed that "the Interstate Commerce Commission acting under *comparable statutory provisions* had held that service between the Detroit airports and Flint was not 'incidental to transportation by aircraft' . . . ." Appendix, p. 16a. Coupled with this showing was Petitioners' sworn factual statement that the service proposed could not be rendered in the manner Emery alleged. In the face of this joinder of an issue of fact, the Board could not, as it did, base a finding on Emery's unsworn allegations.

An adequate record is especially necessary when, as in *Law* and here, the Board is dealing with "pilot cases

[that] present new policy questions with no precedent for guidelines." In such cases the courts are charged with determining, not simply whether the Board properly applied settled policies and standards in a particular case, but whether it has formulated policies and standards that are rational, appropriate to the discharge of its regulatory duties, and within the scope of the power the Congress delegated to it. In such cases something more than a scant, general, sparse and thin record is imperative. See *Eastern Central Motor Carriers Association* v. *United States,* 321 U.S. 194, 209-210 (1944), in which this Court, reversing an order of the Interstate Commerce Commission, held that what might be an adequate record in an ordinary case is not adequate in a case presenting, as do the cases here, "novel" and "complex" questions of policy that "may touch vitally the public interest."

One searches the record here in vain for any of the economic data and facts that *Law* held relevant. As for the Board's order, it reflects the same "lack of developed thought" that Judge Aldrich found shocking in *Northeast Airlines, Inc.* v. *C.A.B.,* 331 F. 2d 579, 589 (1st Cir. 1964). Indeed, on the basis of the record here the Board's policies and standards appear to be that whatever motor transportation air carriers wish to perform is pickup and delivery service in connection with air transportation.

## CONCLUSION

It is of course true that the Interstate Commerce Commission has reserved the right to institute a proceeding to define individually the area around any particular city within which motor service by air carriers will be exempt from its regulation as "incidental

to transportation by aircraft." 49 C.F.R. § 210.40, Appendix, p. 4a. But this does not render review of the Board's action by this Court any the less important. The Board and *Law,* as we have seen, *supra,* p. 20, contemplate dual regulation. Even if they be wrong, as *Air Dispatch* indicates,[12] and as assuredly they must be if interagency conflict is to be avoided, the practical effect of the application of the Board's so-called "new formula" will be to require an individual terminal area proceeding before the Commission in every case in which the Board grants an application under Section 222.3 of its Economic Regulations.

In its Preamble to Part 222 of its Regulations the Board Pointed out that the President's Transportation Message to the Congress of April 5, 1962 requested it and the Commission "to discuss regulatory problems affecting the various modes of transportation and to seek coordinated solutions . . . that will improve the regulatory process." (Appendix, p. 6a at p. 7a). The "complementary" regulations of the Board and the Commission were the first fruit of compliance with that request. The Board's actions under its part of the "complementary" regulations clearly makes them an exercise in futility. We submit that the interpretation of the Federal Aviation Act and Part 222 that violates their terms, aborts their purpose and produces results which are the antithesis of "coordinated solutions . . . that will improve the regulatory process" requires review by this Court.

---

[12] See 237 F. Supp. at 452, where the Court said that the "determination by the C.A.B. as to a reasonable terminal area may be completely overruled by the I.C.C."

Wherefore, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review its judgment in this cause.

Respectfully,

BRYCE REA, JR.
THOMAS M. KNEBEL
917 Munsey Building
1329 E Street, N.W.
Washington, D. C. 20004

RONALD R. PENTECOST
1400 Michigan National Tower
Lansing, Michigan 48933

*Counsel for Petitioners*

# APPENDIX

# APPENDIX

## Relevant Statutes

Interstate Commerce Act, Section 203(b)(7a), 49 U.S.C. § 303(b)(7a):

> Section 203(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft; . . .

Federal Aviation Act of 1958, Section 403(a), 49 U.S.C. § 1373(a):

> Section 403(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of

currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

Administrative Procedure Act

5 U.S.C. § 551(8), (9):

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

5 U.S.C. § 556(d):

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. § 706 Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;

**Relevant Regulations**

Interstate Commerce Commission:

49 C.F.R. § 210.40 Motor transportation of property incidental to transportation by aircraft.

(a) *Property moving in collection, delivery, or transfer service.* Transportation of property by motor vehicle is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act provided (1) that it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier or

air freight forwarder (indirect air carrier) providing the line-haul transportation, which terminal area, if the line-haul air transportation is provided by a carrier subject to economic regulation under the Federal Aviation Act, has been described in a tariff filed with and accepted by the Civil Aeronautics Board, and (2) that it is confined to the transportation of shipments which have been received from or will be delivered to a direct air carrier or air freight forwarder as part of a continous movement which, if provided by an air carrier subject to economic regulation under the Federal Aviation Act, shall be provided for in tariffs filed with and accepted by the Civil Aeronautics Board, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier.

• • • •

(c) *Individual determination of exempt zones.* Upon its own motion or upon petition filed by any interested person, the Interstate Commerce Commission may, in an appropriate proceeding, determine whether the area within which the transportation of property by motor vehicle, in bona fide collection, delivery, or transfer service, must be performed, in order to come within the provisions of paragraph (a) of this section, should be individually determined with respect to any particular airport or city authorized to be served by a direct air carrier or airfreight forwarder holding authority from the Civil Aeronautics Board, and whether there should be established therefor appropriate boundaries, differing in extent from the terminal areas of such direct air carriers or freight forwarders as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

• • • •

49 C.F.R. § 404.1 Use by air freight forwarders of regulated motor common carrier service.

An air freight forwarder (indirect air carrier) subject to economic regulation under the Federal Aviation Act may receive from or turn over to motor common carriers subject to economic regulation under part II of the Interstate Commerce Act shipments the transportation of which is not within the scope of the incidental-to-aircraft exemption of section 203(b)(7a) of the Interstate Commerce Act without being considered as conducting operations as a freight forwarder subject to part IV of the Interstate Commerce Act provided:

(a) That the air freight forwarder shall not hold out to assume responsibility for, nor make any claim in its advertising, solicitation of freight, or tariff publications that it will assume responsiblity for, any shipment prior to its receipt from or after it is turned over to an authorized motor common carrier for movement beyond the air freight forwarder's terminal area as defined in tariffs filed with and accepted by the Civil Aeronautics Board.

(b) That all shipping documents issued by the air freight forwarder shall state clearly that its responsibility for the shipment does not extend beyond its actual air movement and the territorial extent of its terminal area as provided for in tariffs published with the Civil Aeronautics Board.

(c) That the air freight forwarder shall receive no compensation from any shipper or motor carrier for services rendered in connection with the receipt of shipments from or the delivery of shipments to a motor carrier for movement beyond the air freight forwarder's terminal area.

Civil Aeronautics Board

14 C.F.R. § 222

**Part 222—Air Cargo Pickup and Delivery Zones; Filing of Tariffs; Application for Authority to File**

By Notice of Proposed Rule Making, 26 F.R. 8037, and Economic Draft Release No. 33, Docket 12951, the Board announced it had under consideration a new Part 222 of the Economic Regulations relating to the determination of zones for air cargo pickup and delivery services which may be provided pursuant to appropriate tariff filings. Therein the Board described the current practice under which an air carrier decides at which locations it wishes to provide pickup and delivery service (if at all) in and around a particular point certificated to receive air service, and files a pickup and delivery tariff with the Board setting them out. In deciding whether to accept or reject the tariff, the Board has used distance criteria. Generally speaking, tariff proposals for pickup and delivery service at distances extending beyond 25 miles either from the airport through which the carrier serves the particular point, or from the corporate limits of the city, have not been regarded as acceptable. In a number of instances, tariffs providing for services substantially beyond a 25-mile limit have been permitted to become effective, particularly at the more important certificated points.

The notice stated that the procedure of regulating terminal area services through tariff rejections under the 25-mile rule of thumb has been challenged both on a procedural basis as well as with respect to substantive validity. In that connection, the Board noted the differing views of the various classes of air carriers which had been previously solicited as to the need for changes in the Board's air cargo pickup and delivery tariff procedures and policy.

The Board sought comments on a proposed rule which contemplated the acceptance of pickup and delivery tariffs for services (a) within an area of 50 miles of the municipal center of any point receiving air service, and (b) within any "authorized pickup and delivery zone" as might be

specifically established by the Board for the major air cargo generating points. It also contemplated an application procedure under which pickup and delivery service could be considered to locations which had not been previously authorized pursuant to (a) and (b) above.

The Board's notice adverted to the jurisdictions of the Civil Aeronautics Board and the Interstate Commerce Commission in relation to air cargo pickup and delivery services. The Board's jurisdiction is confined to the acceptance or rejection of pickup and delivery tariffs filed under section 403(a) of the Federal Aviation Act as service "in connection with . . . air transportation" while the Interstate Commerce Commission must decide whether such surface transportation is a service which is "incidental to transportation by aircraft" under the Interstate Commerce Act and thus exempted pursuant to section 203(b)(7a) of Part II of that statute, or alternatively, whether a certificate of public convenience and necessity must be issued by that Commission authorizing such service. The notice stated that obviously the Board and the Commission should strive to administer the respective Acts so that there is no undue conflict between what the Board considers "service in connection with . . . air transportation" and what the Commission considers service "incidental to transportation by aircraft." In this connection, the Interstate Commerce Commission instituted a rulemaking proceeding in October 1961[1] to determine and prescribe by regulation the circumstances under which, and the areas or distances within which, the motor carriage of property in interstate or foreign commerce is transportation incidental to transportation by aircraft within the meaning of section 203(b)(7a) of the Interstate Commerce Act.

In his Transportation Message to Congress of April 5, 1962, the President stated that he was "requesting the

---

[1] Motor Transportation of Property Incidental to Transportation by Aircraft (No. MC-C-3437).

Chairmen of the Civil Aeronautics Board, the Interstate Commerce Commission, and the Federal Maritime Commission, to meet at frequent intervals to discuss regulatory problems affecting the various modes of transportation and to seek coordinated solutions in the form of legislative or administrative action that will improve the regulatory process." Pursuant to the request, inter-agency committees have been established on Terminal Area matters and Freight Forwarder matters, and meetings for the consideration of their problems have been held on the Commission and staff levels.

In the Board's rulemaking proceeding, extensive comments were received as a result of the original notice and a supplemental notice, dated February 5, 1963, which sought specific information as to the adequacy of ICC licensed trucker services for air cargo pickup and delivery beyond the 25-mile zone.

On the basis of the extensive information which has been made available to the Board, we have reached these conclusions: full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is vital to prevent a stifling of the potential of air cargo transportation.

There are numerous certificated points which have only limited pickup and delivery services or where such service extends to the corporate limits of the community or only slightly beyond. This situation apparently reflects the current limited use of air cargo at these points. For these

communities, it is clear that the Board's present procedure of accepting tariffs under the 25-mile rule of thumb is adequate and raises no significant regulatory question for either the CAB or the ICC.

We therefore need be concerned with only the relatively few major air cargo generating points—where today effective tariffs on file with the Board provide for extensive pickup and delivery services which, in several cases, go well beyond the 25-mile rule-of-thumb area. In those instances where true pickup and delivery services are provided in relatively small vans or straight trucks and geared to air carrier schedules, such services appear to constitute "service in connection with air transportation," and we have no reason to believe that such tariffs are not properly filed. Furthermore, to the extent that additional direct air carriers or air freight forwarders desire to file pickup and delivery tariffs of their own proposing similar service in these areas, they will also be accepted.

There remains the question of considering any requests by direct air carriers or air freight forwarders for extension of pickup and delivery services beyond the areas covered by existing tariffs or the established 25-mile rule-of-thumb area. The Board believes that this should be considered only on the basis of an application procedure (similar to that set forth in our notice of proposed rulemaking) which would provide for notice to and comments by interested persons. The Board will consider any such requests in the light of whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport. The Board would receive and consider any comments by over-the-road truckers and particularly any evidence as to whether the proposed service is in the nature of surface line haul.

Subsequent acceptance by the Board of air cargo pickup and delivery tariffs under these standards would not, of course, interfere with the freedom of the ICC to determine whether the related motor transportation did or did not come within the section 203(b)(7a) exemption. The Board anticipates, however, that the ICC will give due and appropriate weight to the Board's findings that the contemplated services are truly air cargo pickup and delivery in nature, as it does today.

In consideration of the foregoing, the Civil Aeronautics Board hereby adopts, effective June 12, 1964, new Part 222 of its regulations (14 CFR Part 222), to read as follows:

**Part 222—Air Cargo Pickup and Delivery Zones; Filing of Tariffs; Application for Authority to File**

Sec.

222.1 Applicability.

222.2 Filing of tariffs.

222.3 Service to locations not previously authorized.

§ 222.1 *Applicability.* This part is applicable to the provision of pickup and delivery services in connection with air transportation of property at any point within the United States or its territories and possessions by any carrier subject to Part 221 of the Board's Economic Regulations.

§ 222.2 *Filing of tariffs.* In accordance with the provisions of Part 221 and this regulation, each carrier shall file tariffs covering all pickup and delivery services offered. Such tariffs will be accepted for filing if they meet the requirements of Part 221 and (a) provide for service to places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point, or (b) provide for service to places or areas included in

other currently effective pickup and delivery tariffs on file with the Board, or (c) are authorized upon application of the carrier filed in accordance with section 222.3 hereof. A certification shall accompany each tariff filing identifying the category within which each pickup and delivery service falls.

§ 222.3 *Service to locations not previously authorized.*

(a) *Application.* If a carrier, subject to this part, desires to file a tariff providing for pickup and delivery service to any location(s) not authorized by section 222.2 of this part, such carrier shall file with the Board a written application for authority to do so. Such application, in an executed original and nineteen copies, shall be conspicuously entitled "Application for Tariff-filing Authority: Pickup and Delivery Zone"; shall clearly identify the location(s) for which tariff-filing authority is requested; shall state the reasons why service to such location(s) is deemed appropriate and set forth economic data and other facts relied upon; shall contain a notice that persons served may, within 15 days, file and serve an answer in support of or in opposition to the application; shall set forth the names and addresses of the persons required to be served and state that service has been made on all such persons by personal service or by registered or certified mail, and the date of such service. In the case of service by mail, the date of mailing shall be considered the date of service. Each copy of an application served pursuant to this part shall state that such service is made pursuant to Part 222 of the Civil Aeronautics Board's Economic Regulations.

(b) *Service of application.* A copy of each application shall be served upon such persons as the Board may designate in a particular case, and in all cases shall be served upon each scheduled air carrier and air freight forwarder which regularly renders service to or from a point involved, and upon the Secretary, Interstate Commerce Commission,

Washington, D. C. The Board shall also publish notice of the application in the Federal Register.

(c) *Answers.* Any interested person may file an answer with the Docket Section of the Board in opposition to or in support of an application. In the case of persons served by the applicant under paragraph (b), answers shall be filed no later than 15 days after the filing of the application. In the case of other interested persons, answers shall be filed no later than 15 days after publication of notice of the application in the Federal Register. An answer shall be filed in an executed original and nineteen copies. It shall set forth in detail the reasons for the position taken and include such economic data and facts as are relied upon. It shall also be served upon the applicant and state the date of such service. Unless ordered by the Board upon application or upon its own motion, further pleadings will not be entertained.

(d) *Order of approval.* Tariffs to which this paragraph relates shall not be filed unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation.

(e) *Effectiveness of authority.* Authority to include any location(s) in a pick-up and delivery tariff granted pursuant to the procedure of this section shall be subject to revision or revocation without evidentiary hearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 19,953

---

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,

and

UNITED MOTOR FREIGHT, INC., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

EMERY AIR FREIGHT CORPORATION, INTERVENOR

---

Petition for Review of Order of the
Civil Aeronautics Board

---

Decided December 6, 1966

*Mr. Bryce Rea, Jr.*, with whom *Messrs. Thomas M. Knebel* and *F. G. Freund* were on the brief, for petitioners.

*Mr. Warren L. Sharfman*, Associate General Counsel, Civil Aeronautics Board, with whom *Assistant Attorney General Turner, Messrs. Joseph B. Goldman*, General Counsel, *O. D. Ozment*, Deputy General Counsel, *Robert L. Toomey*, Attorney, Civil Aeronautics Board, and *Howard E. Shapiro*, Attorney, Department of Justice, were on the brief, for respondent.

*Mr. George C. Neal* for intervenor. *Mr. Brian C. Elmer* also entered an appearance for intervenor.

Before FAHY, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and TAMM, *Circuit Judge*.

**Judgment**

This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Civil Aeronautics Board on review herein is affirmed. See *Law Motor Freight* v. *CAB, Inc.*, No. 6731, 1st Cir., July 20, 1966.

Per Curiam

FAHY, *Circuit Judge, dissenting:* The above order of the court has the effect of approving an order of the Civil Aeronautics Board granting the application of Emery Air Freight Corporation, intervenor, to file a tariff for service in connection with air transportation under the provisions of Section 403(a) of the Federal Aviation Act of 1958,[1] and regulations issued by the Board under the authority of the Act.[2] The grant of the application, which was opposed by petitioners National Motor Freight Traffic Association, Inc., and United Motor Freight, Inc., permits the intervenor to engage in motor transportation of property between Flint and the airports of Detroit by a pickup and delivery service rather than by a line haul service such as is employed by petitioner United between Flint and the Detroit airports.

I agree with the Board that the application of Emery should not be denied on the written data presented to the Board, but I think the alternative relief sought by our petitioners, namely, a hearing before the Board, should have been granted. Although the distance between Flint and Detroit is 45 miles, the distance between Flint and the Detroit airports to be served is 65 or 80 miles, depending on routing. The grant of Emery's application thus permits

---

[1] 72 Stat. 758, 49 U.S.C. § 1373.

[2] 14 C.F.R. § 222.2.

a service which greatly exceeds in mileage the rule-of-thumb terminal area established by the Board for pickup and delivery service, namely, 25 miles.

The regulations applicable to the situation include Board regulation 222.3(d), which reads:

> *Order of Approval.* Tariffs to which this paragraph relates shall not be filed unless and until the Board by order approves the application finding that the proposed tariff involves service in connection with air transportation.[3]

Thus a finding is required that the proposed tariff involves service in connection with air transportation. In the context of this case this means a pickup and delivery service as distinct from a line haul service.

The reason I think a hearing is required is that the finding to be made requires resolution of the controversy over the nature of the service, and that controversy could not be resolved upon the basis of the only data before the Board. By motion United challenged the claim of Emery that the tariff was for a good faith pickup and delivery service and not a service which in fact could be furnished only by a line haul operation. The motion was supported by an affidavit of United's Treasurer, which states in part:

> Since the operating authority of United Motor Freight is limited to the handling of air freight its success depends on its ability to do what is has done, namely, gear its operations to the specific needs of shippers and receivers of air freight. This specialized service is nevertheless line haul service. The cities of Lansing, Jackson, Owosso and Flint could not be adequately, economically or efficiently served in pickup and delivery operations. One hallmark of pickup and delivery of less-than-truckload shipments is their movement from point of receipt by the carrier to point of delivery by that carrier without consolidation with

[3] 14 C.F.R. § 222.3(d).

> other shipments, i.e. without "terminalling." The distance from Flint to the Detroit airports is too great to permit this to be done economically or efficiently as a matter of routine. Hence, apart from the fact that Flint is in no sense within the bounds of the commercial zone or terminal area of Detroit, air freight shipments to and from Flint are and must be handled as line haul movements.

United also brought to the Board's attention that the Interstate Commerce Commission, acting under comparable statutory provisions,[4] had held that service between Detroit airports and Flint was not "incidental to transportation by aircraft" and therefore was not exempt from the Commission's certification requirements.

The Board relied upon *Eastern Airlines* v. *CAB*, 87 U.S. App. D.C. 331, 185 F.2d 426, for the proposition that United may not complain of damage from competition made possible by an unauthorized administrative action. I do not think the proposition applies here,[5] for though the Constitution does not guarantee protection against such damage, the agency nevertheless must follow a procedure consistent with its valid regulations reasonably construed. And having disclosed a "substantial interest" in the Board's order, United is entitled to judicial review of that order.[6]

---

[4] Civil Aeronautics Act of 1938, § 1107(j), 52 Stat. 1029, 49 U.S.C. § 303(b)(7a).

[5] See 1 Davis, Administrative Law, 412, which reads:

> The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security, justifies an overriding of the interest in fair hearing.

[6] Federal Aviation Act of 1958, § 1006(a), 72 Stat. 795, 49 U.S.C. § 1486(a).

Considering that the nature of the proceedings was adjudicatory, and that the nature of the result was licensing, I would not classify the grant of the application as rulemaking by the Board. Moreover, the responsibility of the Board to further transportation by air, advanced by the Board in brief and argument as support for its order, does not justify refusing a hearing in this case, where the established 25-mile rule-of-thumb terminal area was exceeded so greatly. As the Board states in its order under review:

> The ultimate question to be resolved in each individual case under such procedure [Part 222 of Board's Economic Regulations] is whether the service proposed by the air carrier is truly pick-up and delivery in nature, or whether it is, in fact, a line-haul operation.

---

Order No. E-22970

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
On the 6th day of December, 1965

Docket 15327

Application of

EMERY AIR FREIGHT CORPORATION

for authority to file a pick-up and delivery tariff.

**Order Authorizing Filing of Pick-Up and Delivery Tariff**

By application filed on June 16, 1964, and amended on September 16, 1964, Emery Air Freight Corporation (Emery) seeks authority to file pick-up and delivery tariffs for extended terminal area service pursuant to Part 222

of the Board's Economic Regulations.[1] Emery seeks authority to file tariffs governing service from Detroit to Flint, a distance of 45 miles, and to charge a rate of $1.75 per cwt. subject to a minimum of $3.50. The rate applicant charges for pick-up and delivery service within the 25-mile zone of Detroit is $1.00 per cwt. subject to a minimum of $3.00.

Emery proposes to utilize vehicles limited to 5,000 pounds capacity to perform the proposed pick-up and delivery service and to schedule its service to connect with the all-cargo scheduled service of the direct air carriers. In support of its application, Emery contends that although Flint is an airport city, it has severely limited air cargo service because (1) almost all scheduled air service between Flint and other airport cities involves connecting flights or stopovers at Detroit's Willow Run Airport, (2) all scheduled service between Flint and Willow Run Airport is performed with passenger aircraft that have limited cargo capacity,[2] and (3) many all-cargo flights between Detroit and other cities use Detroit's Metropolitan Airport which often requires surface transshipment of Flint cargo traffic between airports. Emery further contends that delays caused by shuttling cargo between airports and the limitations of the schedules and capacity of the passenger service provided at Flint have discouraged the development of

---

[1] In adopting Part 222, the Board concluded that the full development of air-cargo transportation depends in large measure upon effective customer-oriented pick-up and delivery service under the control of either the direct air carrier, or the air freight forwarder, and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pick-up and delivery services to test their adequacy and economy.

[2] Flint is served by United Air Lines and North Central Airlines. These carriers provide eight flights daily from Flint to Detroit's Willow Run Airport and seven flights daily from Willow Run Airport to Flint utilizing Convair 440, DC-6B, and Viscount aircraft.

through-bill air cargo service. For these reasons, Emery alleges that grant of tariff-filing authority for extended pick-up and delivery service to Flint from Detroit would encourage development of air freight traffic originating and terminating at Flint.

The National Motor Freight Traffic Association (NMFTA) has filed a motion requesting that the Board dismiss Emery's application, or in the alternative, that it consider the application in an oral hearing. NMFTA contends that the application should be dismissed because (1) the proposed points exceed, in distance, terminal zones recognized as exempt for purposes of motor carrier regulation by the Interstate Commerce Commission (ICC), (2) the economic data filed by the applicant are "not in conformity" with Part 222 and (3) the economic data filed by the applicant are "insufficient" to support a finding that the proposed services are "truly air cargo pick-up and delivery". NMFTA further contends that in the event the application is not dismissed by the Board, the application should be assigned for hearing because (1) the findings require the resolution of issues of fact and (2) all parties should have the right to present their case by oral or documentary evidence, and to submit rebuttal evidence in accordance with the provisions of the Administrative Procedure Act. Furthermore, NMFTA contends that the distance that must be traveled by the applicant in order to perform the proposed services is "unreasonable" and not in the nature of pick-up and delivery because it exceeds the 25-mile rule-of-thumb terminal area zone.[3]

The Board has carefully reviewed the Emery application and the objections thereto, and upon consideration of all relevant facts, we conclude that Emery should be permitted to file tariffs for pick-up and delivery service between Flint and Detroit.

---

[3] As defined by section 222.2 the 25-mile rule-of-thumb area includes "places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point".

Part 222 is designed to provide a fair and workable procedure for considering, on a case-by-case basis, requests by direct air carriers or air freight forwarders for extension of pick-up and delivery services to points beyond the area covered by existing tariffs, or the established 25-mile rule-of-thumb terminal area. The ultimate question to be resolved in each individual case under such procedure is whether the service proposed by the air carrier is truly pick-up and delivery in nature, or whether it is, in fact, a line-haul operation. In addition to considering the distance involved we shall also give weight to whether the proposed service involves the use of specialized equipment, is geared to meeting airline schedules and is oriented to customer air transportation needs.[4]

The fact that we have authorized air carrier service between two points does not prevent a finding that surface transportation of air cargo between the proposed points is a service in connection with air transportation. In this case, the ground transportation proposed is to and from a relatively large air traffic generating point (Detroit) to a secondary point (Flint) as far as air cargo service is concerned. At Detroit the direct air carriers provide, in addition to all-cargo services, multiple schedules in all directions to other major air traffic generating points. On the other hand, Flint does not now have, nor can it expect to receive, the type and volume of service available at Detroit's Metropolitan Airport. Therefore Flint does not offer the type of service which will make available to the community the full advantages inherent in the type of all-cargo service available in Detroit. Only by permitting an integrated air-surface movement under single carrier responsibility will these advantages be afforded the present and potential users of air cargo service at Flint.

The distance between the points here involved is not so far as to preclude the services being offered as part of the

[4] See Preamble to Part 222 of the Economic Regulations.

basic air transportation service at Flint. In this respect the proposed service is no more extensive than services which we have authorized in the extended terminal areas encompassing New York, Chicago and Los Angeles where there is more than one airport terminal in a single terminal area. Furthermore, the applicant proposes to (1) coordinate pick-up an delivery services with the schedules of the direct air carriers serving the airports involved, (2) utilize equipment of the type traditionally used for pick-up and delivery operations, and (3) charge rates which are closely related to charges for pick-up and delivery service at points within the 25-mile rule-of-thumb. Based upon these considerations, we conclude that the service for which authority to file tariffs is granted, constitutes pick-up and delivery service and is "in connection with air transportation" within the meaning of section 403(a) of the Federal Aviation Act of 1958, as amended (the Act).

We turn now to a specific consideration of the objections to grant of the application. Contrary to the contentions of NMFTA, applicant has complied with the requirements of Part 222 by filing data sufficient to show that the proposed service is designed to provide extended air freight pick-up and delivery to the point designated. Moreover, with respect to NMFTA's contention that the point here involved exceeds in distance the terminal zone recognized as exempt for purposes of motor carrier regulation by the ICC, no purpose would be served by speculating whether the ICC ultimately would make such a determination if a proper application were presented to it.[5] The only question here involved is whether the services proposed are in connection with air transportation under section 403(a) of the Act, and in our judgment they are.

---

[5] Our action, of course, is not intended to reflect any views on whether applicant or its motor carrier agent requires additional authority from the ICC or other regulatory agencies.

We turn finally to NMFTA's contention that an oral argument is required or that an evidentiary hearing should be held. The Act does not require that hearings be held in connection with the grant of permission to file pick-up and delivery tariffs. Moreover, we have considered whether to grant NMFTA's request in our discretion and find that no useful purpose would be served by holding an evidentiary hearing. The objecting party has taken full advantage of the opportunity to submit pleadings and briefs and we find no issues of material fact which would require resolution at an evidentiary hearing.[6]

ACCORDINGLY, IT IS ORDERED:

1. That Emery is hereby authorized to file tariffs providing for pick-up and delivery services to Flint from Detroit;

2. That the motion to dismiss and request for oral hearing filed by NMFTA be, and they hereby are denied; and

3. That the authority granted herein shall be subject to amendment or revocation without evidentiary hearing.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
*Secretary*

(SEAL)

---

[6] None of the factual information filed by applicant has been controverted by NMFTA.

# INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes and Regulations Involved | 3 |
| Statement of the Case | 3 |
| Argument: | |
| I. Petitioner's Attack States Only Their Disagreement With Agency Policy, Not A Question Of Law | 7 |
| II. The Decisions Of The Courts Below Are Correct | 10 |
| A. The Criteria Applied By The Board Are Valid | 10 |
| B. Petitioners Had No Right To An Evidentiary Hearing | 14 |
| C. The Board's Findings Are Supported By Substantial Evidence | 16 |
| Conclusion | 17 |
| Appendix | 18 |


## CITATIONS

Cases:


| | |
|---|---|
| *American Airlines, Inc.* v. *CAB*, 123 App. D.C. 310, 359 F.2d 624, *cert. denied*, 385 U.S. 843 (1966) | 15 |
| *American Airlines, Inc.* v. *CAB*, 97 App. D.C. 324, 231 F.2d 483 (1956) | 15, 16 |
| *Central Truck Lines, Inc.* v. *Pan-Atlantic S.S. Corp.*, 82 M.C.C. 395 (1960), *aff'd. sub nom., Sea-Land Service, Inc.* v. *United States*, 222 F. Supp. 558 (D. Del. 1963) | 12 |

Page

*Eastern Air Lines, Inc.* v. *CAB*, 87 App. D.C. 331, 185 F.2d 426 (1950) ..... 15, 16
*Federal Communications Commission* v. *WJR*, 337 U.S. 265 (1949) ..... 16
*Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 (1964) ..... 13
*St. Louis, Mo.-East St. Louis, Ill. Commercial Zone*, 61 M.C.C. 489 (1953) ..... 15
*Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118 (1939) ..... 16

Statutes:

Administrative Procedure Act, 5 U.S.C. § 553(c) ... 15
Civil Aeronautics Act of 1938, Act of June 23, 1938, ch. 601, 52 Stat. 977
Section 403(a) ..... 4

Federal Aviation Act of 1958
Section 204(a) (49 U.S.C. § 1324(a)) ..... 4, 14
Section 403(a) (49 U.S.C. § 1373(a)) ...4, 5, 6, 10, 14
Section 404 (49 U.S.C. § 1374) ..... 4
Section 1002(d) (49 U.S.C. § 1482(d)) ..... 4

Interstate Commerce Act
Section 202(c)(1) (49 U.S.C. § 302(c)(1)) .... 13
Section 203(b)(7a) (49 U.S.C. § 303(b)(7a)) .....4, 5, 13
Section 203(b)(8) (49 U.S.C. § 303(b)(8)) .... 13

Regulations:

Civil Aeronautics Board
Part 222 (14 C.F.R. 222) .....5, 6, 8, 10, 14
Section 222.3 (14 C.F.R. 222.3) ..... 5, 14

Interstate Commerce Commission
Section 210.40 (49 C.F.R. § 210.40) ..... 5, 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

---

No. 989

---

LAW MOTOR FREIGHT, INC. and NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
*Petitioners,*

*v.*

CIVIL AERONAUTICS BOARD and EMERY AIR FREIGHT CORPORATION,
*Respondents.*

---

No. 1160

---

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., and UNITED MOTOR FREIGHT, INC.,
*Petitioners,*

*v.*

CIVIL AERONAUTICS BOARD and EMERY AIR FREIGHT CORPORATION,
*Respondents.*

---

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

## OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit and the opinion and order of the Civil Aeronautics Board affirmed by the Court of Appeals for the First Circuit are adequately described and set forth in the Appendix of the Petition in No. 989 at 13a-31a.

The judgment of the Court of Appeals for the District of Columbia Circuit and the opinion and order of the Civil Aeronautics Board affirmed by the Court of Appeals for the District of Columbia Circuit are adequately described and set forth in the Appendix of the Petition in No. 1160 at 13a-22a.

## JURISDICTION

The jurisdictional requisites in each case are adequately set forth in the respective Petitions.

## QUESTIONS PRESENTED

1. Whether the determinations of the Civil Aeronautics Board that particular motor vehicle services proposed to be included in an air carrier's tariff are "services in connection with . . . air transportation" within the meaning of section 403(a) of the Federal Aviation Act, and therefore to be treated as pickup and delivery services to and from certain airports for air cargo shipments, have a rational basis reasonably within the meaning of the statutory phrase quoted.

2. Whether, prior to making these determinations, the Civil Aeronautics Board was required to hold evidentiary hearings where: (a) the statute requires none; (b) Petitioners were given notice and an opportunity to present to the Board in written form any facts and argument in rebuttal to matters set forth in the applications and

relied on by the Board; (c) Petitioners tendered no issue of material fact; and (d) Petitioners' only interest was freedom from competition by the air carriers.

3. Whether the findings of the Civil Aeronautics Board are supported by substantial evidence.

## STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Aviation Act are Section 403(a), 49 U.S.C. § 1373(a) (set forth in the Appendices of the Petitions in Nos. 989 and 1160), and Section 204(a), 49 U.S.C. § 1324(a) (set forth at page 18 of the Appendix hereto). The pertinent provisions of the Interstate Commerce Act are Section 203(b)(7a), 49 U.S.C. § 303(b)(7a) (set forth in the Appendices of the Petitions in Nos. 989 and 1160), Section 202(c)(1), 49 U.S.C. § 302(c)(1), and Section 203(b)(8), 49 U.S.C. § 303(b)(8) (set forth at pages 18-19 of the Appendix hereto). The pertinent provision of the Administrative Procedure Act is contained in 5 U.S.C. § 553(c) (set forth at page 19 of the Appendix hereto). The pertinent provisions of the regulations of the Civil Aeronautics Board and the Interstate Commerce Commission are set forth in the Appendices of the Petitions in Nos. 989 and 1160.

## STATEMENT OF THE CASE

A brief description of the historical background of the regulations involved is necessary to an understanding of the case.

Since aircraft can operate only to and from airports, air freight must move to some extent by surface means in order to flow between aircraft and airport, on the one hand, and consignee or consignor, on the other hand. That such a surface movement for the pickup and de-

livery of air freight is an essential part of the air movement and should be regulated as such, was recognized by Congress in its first comprehensive aviation regulatory statute, the Civil Aeronautics Act of 1938 (Act of June 23, 1938, ch. 601, 52 Stat. 977), predecessor statute to the present Federal Aviation Act of 1958. In the 1938 statute Congress amended section 203(b) of the Interstate Commerce Act by adding subsection (7a) (49 U.S.C. § 303(b)(7a)) so as to exempt from motor carrier economic regulation by the Interstate Commerce Commission

> "the transportation of . . . property by motor vehicle when incidental to transportation by aircraft . . . ."

At the same time a provision was inserted in section 403 (a) of the Civil Aeronautics Act of 1938 which required direct and indirect air carriers to include in air transportation tariffs filed with the Board "all classifications, rules, regulations, practices and services in connection with such air transportation." That provision continues in effect in the same section of the present Federal Aviation Act (49 U.S.C. § 1373(a)). Other provisions of the present Act give the Board certain regulatory powers over matters contained in tariffs (e.g., sections 204a, 404, 1002(d), 49 U.S.C. §§ 1324(a), 1374, 1482(d)).

The Board and the Commission for many years have interpreted these statutory provisions as constituting bona fide motor vehicle pickup and delivery service for air freight a service "in connection with . . . air transportation" which is to be included in air carrier tariffs as a part of air transportation service and rates and which is exempt from economic regulation by the Commission under the Interstate Commerce Act. Until recently there were no general regulations prescribing precisely how the respective provisions of section 403(a) of the Federal Aviation Act and section 203(b)(7a)

of the Interstate Commerce Act would be administered and meshed.

In 1964, however, following joint consultations between the Board and the Commission, the two agencies issued complementary regulations as a means of clarifying what in general would be regarded as reasonable areas for air freight pickup and delivery service—and also providing procedures for their determination in particular instances.

The regulation adopted by the Board at that time was Part 222 of its Economic Regulations. The statutory basis for Part 222 is the provision of section 403(a) of the Federal Aviation Act that air transportation tariffs should include "services in connection with such air transportation."

Concurrently with the issuance of the Board's regulation, the Interstate Commerce Commission issued a regulation (49 C.F.R. § 210.40) in which it provided that areas for services "incidental to transportation by aircraft" within the meaning of the exemption from motor carrier economic regulation provided by section 203(b)(7a) of the Interstate Commerce Act would be the pickup and delivery areas established in air carrier tariffs pursuant to Part 222 of the Board's regulations.[1]

Part 222 of the Board's regulations provides that pickup and delivery services "to places which are not located beyond a radius of 25 miles of the airport or of the city limits of the certificated point" may be included in air carrier tariffs without the necessity of Board consideration or approval. Board approval of service beyond such an area, however, must be sought, under section 222.3 of

[1] The Commission reserved the right on "its own motion or petition" to determine whether the exempt area should be different at a particular point than that set out in air carrier tariffs. As the Commission also noted, these exemptions apply only for the carriage of air freight in a continuous movement under a through airbill.

Part 222, by filing of an application for authority to file a tariff for such service. The Board is then to make a determination whether the service proposed is "in connection with . . . air transportation" within the meaning of section 403(a) of the Federal Aviation Act. The standards by which the Board makes this determination are set forth in a narrative preamble to Part 222 of the Board's Economic Regulation:

> "The Board will consider any such requests [for authority to file a tariff to provide air cargo pick-up and delivery service beyond the 25-mile zone] in the light of whether the proposed service is truly air cargo pickup and delivery with the use of specialized equipment (vans or straight trucks) and geared to meeting airline schedules and oriented to customer air transportation needs, as distinguished from line-haul or over-the-road surface transport." (Appendix of Petition in No. 1160 at 9a)

Emery Air Freight Corporation, an air freight forwarder, filed applications pursuant to Part 222 for authority to file air cargo pick-up and delivery tariffs for such service between the Boston, Massachusetts, airport and Nashua, New Hampshire, and for such service between the Detroit, Michigan, airport and Flint, Michigan. The airline distance between Boston and Nashua is 34 miles; the airline distance between Detroit and Flint is 45 miles.

Pursuant to the procedure provided in Part 222, Petitioner had an opportunity to file, and did file, with the Board objections to the grant of both applications. The Board denied Petitioners' motions to dismiss Emery's applications, denied, after receiving Petitioners' written submissions, Petitioners' requests for an evidentiary hearing on the applications, and granted both applications (Appendix of Petition in No. 989 at 26a-31a; Appendix

of Petition in No. 1160 at 17a-22a). Petitioners sought judicial review of the order relating to Nashua service in the United States Court of Appeals for the First Circuit and of the order relating to Flint service in the United States Court of Appeals for the District of Columbia Circuit. On review, both courts affirmed (Appendix of Petition in No. 989 at 13a-25a; Appendix of Petition in No. 1160 at 13a-17a).

## ARGUMENT

### I. Petitioner's Attack States Only Their Disagreement With Agency Policy, Not A Question Of Law.

These cases do indeed, as Petitioners have noted, present "new policy questions." But they are *policy* questions and, as such, have been entrusted by statute to the Civil Aeronautics Board and the Interstate Commerce Commission under broad general standards. Those standards—motor vehicle service "in connection with . . . air transportation" and motor vehicle service "when incidental to transportation by aircraft"—obviously must derive their content and meaning primarily from policy concepts as to how best to mesh the surface pickup and delivery and the air freight movement. The arguments which Petitioners would have the Court consider and act on are, at most, simply disagreements with the policy concepts the Board and Commission have now adopted in their regulations on the subject. Unless and until agency resolution of the policy questions results in a conflict in the agencies' assertions of jurisdiction there exists no legal question warranting this Court's review.

Petitioners seek this Court's interest and attention for its challenge by describing what they view as a conflict between the Board's assertion of its duty to promote air transportation and the role of the Interstate Commerce

Commission in regulating motor transportation.[2] Petitioners assert a conflict which does not exist.

Petitioners ignore the fact that the Board statement concerning the development of air cargo transportation, in which it defined Board policy in the matter of air cargo pick-up and delivery service, was issued only after *joint consultation* between the Board and the Commission and that that policy represents a *joint resolution* of the potential jurisdictional conflict. The Commission itself issued its own complementary regulation on the subject (49 C.F.R. § 210.40) in which it expressly recognized the Board's regulation and made specific provision for the consistent operation of its regulation with the Board's.

Nor does any conflict arise from the fact that the Commission itself defines *air* carrier pickup and delivery zones in a different and broader manner than it defines *surface* carrier pick-up and delivery zones. This difference is firmly grounded on basic differences in the modes of transportation and on differences in the statutory provisions being applied: See discussion at pages 12-14, *infra*. Earlier Commission decisions (see Appendix of Petition in No. 1160 at 16a) on the basis of which Peti-

---

[2] The Board is under a congressional mandate to promote the development of air transportation. The Board stated its conclusion in the narrative preamble to Part 222 of its regulations that:

> "Full development of air cargo transportation depends, in large measure, upon efficient surface transportation; effective customer-oriented pickup and delivery service can best be guaranteed when it is under the control of the direct air carrier or the air freight forwarder; this control can be maintained by the operation of trucks directly by the air carrier and the air freight forwarder or under contract with local cartage agents; and a reasonable amount of freedom for the direct air carriers and air freight forwarders to establish pickup and delivery services and to test their adequacy and economy is vital to prevent a stifling of the potential of air cargo transportation." (Appendix of Petition in No. 1160 at 8a)

tioners suggest the possibility of a conflict must be viewed in the light of the Commission's more recent decisions and joint action with the Board.

Neither the Board nor the Commission has been heard to complain of any agency conflict in this matter. While these agencies are in the middle of a constructive joint search for a policy which will accommodate the nation's air transportation needs without injuring the nation's transportation system as a whole, it would be wholly inappropriate to judicially define that policy, by way of statutory construction, where, as here, the applicable statutory standards were broadly stated in order to permit the administrative flexibility necessary to meet future avenues of development in a new mode of transportation.

It is not the Board's policy as embodied in the regulation and orders involved here that has major ramifications for the nation's transportation system as Petitioners suggest. The ramifications are implicit in the changes being brought about by technological advances in the air transport industry itself. The Board, and the Commission, must be permitted reasonable latitude to work out the intermodal transport problems created by those advances. Petitioners would have the capacity of the agencies to meet these dynamic developments reduced to a purely legalistic formula. There is nothing in the language of the statutes which warrants such a narrow approach. Common sense condemns it.

As to procedure, Petitioners ask this Court to declare that there is a right to an evidentiary hearing on these Board determinations of general and future application even though the statute under which the Board acted affords no such right. That the right to an evidentiary hearing does not exist in these circumstances has long been settled by judicial and legislative definition of hearing rights and does not warrant this Court's review.

## II. The Decisions Of The Courts Below Are Correct.

### A. *The Criteria Applied By The Board Are Valid.*

Section 403(a) of the Federal Aviation Act and Part 222 of the Board's Economic Regulations require that the Board's orders authorizing an air carrier to file tariffs providing for pickup and delivery service be based upon a finding that the proposed service is "in connection with . . . air transportation." The Board specifically made such a finding in both orders involved here (Appendix of Petition in No. 989 at 30a; Appendix of Petition in No. 1160 at 21a).

Petitioners' contention that the criteria by which the Board determined that the proposed services are "in connection with . . . air transportation" are not lawful raises the single question whether the criteria employed by the Board in making that finding have a rational relationship to the statutory phrase being applied. Whatever the form and content of petitioners' attack the question raised is the simple one: Do the Board's criteria rationally test whether a proposed service is "in connection with . . . air transportation"?

The Board's criteria, and their rational relationship to the concept of "service in connection with . . . air transportation," may be summarized as follows:

(1) In the Flint-Detroit order, the Board found that the proximity of the communities, the multiple airport complex there within a relatively limited geographical area, the nature of the dispersion of air schedules as between airports, and the inherent factors present which would continue to concentrate the area's air freight service at the Detroit airports, make Flint and Detroit a single economic unit for air freight service. This is a perfectly rational reason for concluding that the carriage

between the Detroit airports and Flint of Flint air freight to and from points beyond Detroit is service in connection with air transportation. Similarly, in the Nashua-Boston order the Board found that the dependence of Nashua upon Boston's Logan Airport for air freight service, the proximity of the communities and their close commercial and industrial affinity constituted Nashua and Boston a single economic unit for air freight service.

(2) The Board further assessed the service in light of the proposed use of specialized motor vehicle equipment (specialized in the sense that it is adapted to pickup and delivery operations). This, of course, is indicative of pickup and delivery operations and, almost by definition, tests the proposal against the statutory standard.

(3) Other criteria used by the Board were the coordination of the surface carriage with the direct air carrier schedules, the orientation of the service to purely customer air transportation needs, and the structure of rates in a manner closely relating them to pickup and delivery rates for existing pickup and delivery service within the existing 25 mile pickup and delivery zone. These basic characteristics of the service to be operated, taken together, certainly are reasonable indicators of a service "in connection with . . . air transportation."

Petitioners' argument that these criteria are invalid rests primarly on the premise that the appropriate standard by which to determine whether a service is "in connection with . . . air transportation" is that adopted by the Interstate Commerce Commission in defining areas for transfer, collection or delivery services for *surface*

freight moving on regular line-haul *surface* motor carrier or water carrier services (Petition in No. 1160 at 20). Petitioners' argument must be construed as a contention that the Interstate Commerce Act has defined and limited the definition of service in connection with air transportation required of the Board under the Federal Aviation Act and that the Board's criteria are irrevelant and irrational in terms of that definition. But in addition to the fact that there is nothing in the Federal Aviation Act which so limits the Board's judgment, the Interstate Commerce Commission itself has expressly held that different criteria should be applied in determining terminal areas for *air* carriers than those applied in the case of surface carriers.

The standard advanced by Petitioners is that articulated by the Commission for *surface* carriers in *Central Truck Lines, Inc.* v. *Pan-Atlantic S.S. Corp.*, 82 M.C.C. 395 (1960), *aff'd sub nom., Sea-Land Service, Inc.* v. *United States*, 222 F. Supp. 558 (D. Del. 1963):

> "Any service which goes beyond a single homogeneous community, identifiable as such by the factors of commercial and industrial integrity, population and business density, and the existence of some reasonably compact limit to the geographical scope of community affairs and influence, is intercommunity in character and cannot be considered as bona fide collection, delivery, and transfer service." (82 M.C.C. at 404)

This decision dealt with terminal areas for water carriers. Similar language is found in decisions dealing with terminal areas for line-haul motor freight.

Petitioners fail to point out that there are significant underlying differences in the language of the statute applied by the Commission in those cases and the language of the statute applied by the Board in the present cases. The Commission's concept of a *surface* carrier terminal

area as "a single homogenous community" was developed in the administration of sections 203(b)(8) and 202(c)(1) of the Interstate Commerce Act (49 U.S.C. § 303(b)(8), § 302(c)(1)) which expressly tied the scope of *surface* carrier terminal areas to the concept of a municipality or contiguous municipalties or adjacent commercially integrated areas. The statutory provisions of the Federal Aviation Act under which the Board issued its order in this case do not contain any language which defines the standard the Board must apply as does the language of section 203(b)(8) of the Interstate Commerce Act relating to surface carriers. The statutory language within which the Board's criteria are fashioned and against which they must be judged is simply "services in connection with . . . air transportation." The judgment required under the Interstate Commerce Act exemption for *air* transport pickup and delivery service is defined in equally general terms; section 203(b)(7a) simply refers to "transportation . . . when incidental to transportation by aircraft."

The Interstate Commerce Commission itself has specifically held that the criteria used for the establishment of terminal areas for surface carriers are *not* controlling in delineating the pickup and delivery areas for air transportation. In its decision promulgating the companion regulation to the Civil Aeronautics Board's regulation under which the Board issued its order in this case, the Commission reaffirmed the view that different considerations entered into defining pickup and delivery areas for surface carriers and for air carriers. Petitioners' assertion that the Commission adopted the surface carrier criteria in that decision and its regulation are contrary to the express conclusions of the Commission. In that decision, *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71 (1964), the Commission said:

> "In deciding not to fix a maximum mileage limitation for the 203(b)(7a) exemption, we are obviously

> disagreeing with the contentions of various parties, including petitioners, that shippers and receivers in areas adjacent to cities and communities have the same need for all modes of transportation—rail, express, water, motor vehicle, and air; and that, therefore, the terminal areas of carriers of all modes should be identical . . . . Each mode of transportation has its inherent advantages. Various economic and geographic factors sometimes prompt utilization of one mode of transportation over others. In *Kenny, supra,* we recognized that the *modus operandi* of air carriers is sufficiently different from that of land carriers as to justify special consideration in the matter of terminal area limits which may or may not be somewhat larger than those of land carriers." (95 M.C.C. at 86. Citations omitted.)

It is clear that the statutes involved do not require that the criteria applied by the Board or the Commission be other than those applied by the Board in this case.

### B. *Petitioners Had No Right To An Evidentiary Hearing.*

The Board's order here involved was issued under section 222.3 of the Board's Economic Regulations. Part 222, and section 222.3 of it, were promulgated by the Board pursuant to sections 204(a) and 403(a) of the Federal Aviation Act as an application of the provisions of the latter section providing for the inclusion in air carrier air transportation tariffs of "services in connection with such air transportation." Neither section 403(a) nor section 204(a) of the Federal Aviation Act provide that the Board shall hold a hearing before issuing an order thereunder.

Moreover, the Board's determination in this case is clearly rule-making. Its determinations that pickup and delivery service is involved in air freight service to and from Nashua through Logan Airport and to and from

Flint through the Detroit airport are of future and general application and available to any air carrier whose operations between those points meet the appropriate criteria. Indeed, the Interstate Commerce Commission holds that its determination of individual commercial zone limits of surface carrier terminal areas under section 203 (b) (8) of the Interstate Commerce Act is rule-making. *St. Louis, Mo.-East St. Louis, Ill. Commercial Zone*, 61 M.C.C. 489 (1953). The provisions of the Administrative Procedure Act, 5 U.S.C. § 553(c), require, in the rule-making process, only notice and opportunity to submit "written data, views, or arguments", not an evidentiary trial-type hearing. This alone was an appropriate basis on which to deny Petitioner's claim to a hearing. See *American Airlines, Inc.* v. *CAB*, 123 App. D.C. 310, 359 F.2d 624, *cert. denied*, 385 U.S. 843 (1966).

Petitioners' argument on this point is that the Board's order is a "licensing" of the applicant before the Board, to engage in motor transportation and that in agency "licensing" a hearing must be afforded.

Assuming, *arguendo*, that the Board's action was technically "licensing," neither due process nor any other rule of law requires a hearing for that reason. The several circuit courts of appeals in which the question of the scope of the hearing requirements of the Federal Aviation Act has heretofore been considered have uniformly ruled against such a broad hearing requirement as Petitioners argue for. Thus, in *Eastern Air Lines, Inc.* v. *CAB*, 87 App. D.C. 331, 185 F.2d 426 (1950), and in *American Airlines, Inc.* v. *CAB*, 97 App. D.C. 324, 231 F.2d 483 (1956), petitioning carriers were attacking the issuance by the Board of operating authority by exemption orders to carriers competing with the petitioning carriers. This was clearly licensing, yet it was held that the exemptions could be issued without evidentiary hearings. Like the carriers asserting the right to an agency

hearing in *Eastern Air Lines, Inc.* v. *CAB, supra,* and *American Airlines, Inc.* v. *CAB, supra,* what Petitioners claim at most is a right to be free from competition. Because the complaining carriers had no constitutional right to be free from competition, *Tennessee Elec. Power Co.* v. *TVA,* 306 U.S. 118 (1939), the due process clause gave them no right to be heard before a competing service was authorized.

If, as Petitioners argue, "due process" gave them some claim to a hearing, their right was not to any particular form of hearing. *Federal Communications Commission* v. *WJR,* 337 U.S. 265 (1949). Petitioners had ample opportunity to and did present pertinent facts to the Board bearing upon the question at issue. Their presentation by means of a written answer adequately spread on the record Petitioners' version of the facts relating to an issue of this kind.

Even if a constitutionally protected interest of Petitioners had been at stake in this proceeding, and even if these were not rule-making proceedings, Petitioners had no right to the presentation and cross-examination of witnesses, for the record reveals that there were no disputed material factual issues in these cases. The only issue raised by Petitioners' pleadings and affidavits before the Board was as to the proper legal conclusion to be drawn from admitted facts.

### C. *The Board's Findings Are Supported By Substantial Evidence.*

Given the validity of the Board's criteria, there is no question that the findings made by the Board that these criteria were satisfied are supported by substantial evidence. Petitioners do not in fact really contest the existence of the facts found, but only their legal significance as criteria.

## CONCLUSION

For the foregoing reasons the petitions for writs of certiorari should be denied.

Respectfully submitted,

GEORGE C. NEAL
BRIAN C. ELMER
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Of Counsel:
POGUE & NEAL

April 17, 1967

## APPENDIX

### Relevant Statutes

Federal Aviation Act of 1958, Section 204(a), 49 U.S.C. § 1324(a):

> (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter.

Interstate Commerce Act, Section 202(c)(1), 49 U.S.C. § 302(c)(1):

> Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
>
> (1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder; . . .

Interstate Commerce Act, Section 203(b)(8), 49 U.S.C. § 303(b)(8):

> Nothing in this chapter, except the provisions of section 204 of this title relative to qualifications and

maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (8) the transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; . . .

Administrative Procedure Act, 5 U.S.C. § 553(c):

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 3 |
| Statement | 3 |
| Argument | 9 |
| Conclusion | 14 |
| Appendix | 15 |


CITATIONS

Cases:


| | |
|---|---|
| *Air Dispatch* v. *United States*, 237 F. Supp. 450, affirmed *per curiam*, 381 U.S. 412 | 10 |
| *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 | 4 |
| *American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 | 13 |
| *American Trucking Associations* v. *United States*, 344 U.S. 298 | 13 |
| *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770 | 10 |
| *Eastern Airlines* v. *Civil Aeronautics Board*, 185 F. 2d 426, vacated as moot, 341 U.S. 901 | 13 |
| *Motor Transportation of Property. Incidental to Transportation by Aircraft*, 95 M.C.C. 71 | 7 |
| *Nebraska Department of Aeronautics* v. *Civil Aeronautics Board*, 298 F. 2d 286 | 13 |
| *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, No. 20,350 (C.A.D.C.), decided February 28, 1967 | 14 |




260-688—67——1

Cases—Continued


| | Page |
|---|---|
| *Railway Express Agency* v. *Civil Aeronautics Board*, 345 F. 2d 445, certiorari denied, 382 U.S. 879 | 13 |
| *Udall* v. *Tallman*, 380 U.S. 1 | 13 |
| *Wycoff Co.* v. *United States*, 240 F. Supp. 304 | 10 |
| Statutes and Regulations: | |
| Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 *et seq.*: | |
| Sections: | |
| 101(3) | 4 |
| 401 | 4 |
| 403(a) | 2, 5, 6, 10, 12, 13 |
| Interstate Commerce Act, 49 Stat. 543, 49 U.S.C. 301 *et seq.*, Section 203(b)(7a) | 3, 5, 6, 7, 8, 9, 10 |
| 14 C.F.R. Part 222 | 6 |
| 14 C.F.R. 296 | 4 |
| 49 C.F.R. 210.40 | 7 |
| 26 Fed. Reg. 8037 | 11 |

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 989

LAW MOTOR FREIGHT, INC. AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., PETITIONERS

*v.*

CIVIL AERONAUTICS BOARD, ET AL.

No. 1160

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND UNITED MOTOR FREIGHT, INC., PETITIONERS

*v.*

CIVIL AERONAUTICS BOARD, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND DISTRICT OF COLUMBIA CIRCUITS*

## BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

### OPINIONS BELOW[1]

The opinion of the Court of Appeals for the First Circuit in No. 989 (Pet. App. 13a–24a) is reported

[1] This brief is filed in opposition to two petitions for certiorari. Although separately filed, and challenging judgments of different courts, the issues are the same in both cases and in the first of the two to be filed (No. 989) petitioners "ask the Court to treat the statement of reasons why a writ should be granted" in the second case (No. 1160) "as the reasons why a writ should be granted in this case" (No. 989, Pet. 7–8).

at 364 F. 2d 139. The order of the Civil Aeronautics Board (Pet. App. 26a–31a) is not yet reported.

The Court of Appeals for the District of Columbia Circuit wrote no opinion in No. 1160, although a dissenting opinion (Pet. App. 14a–17a) was written. That court's judgment (Pet. App. 14a) is not yet reported. The order of the Civil Aeronautics Board (Pet. App. 17a–22a) is not yet reported.

## JURISDICTION

The judgment of the court of appeals in No. 989 was entered on July 20, 1966, and a petition for rehearing was denied on August 23, 1966 (Pet. App. 25a). On November 23, 1966, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including January 20, 1967. The petition was filed on that date.

The judgment of the court of appeals in No. 1160 (Pet. App. 14a) was entered on December 6, 1966. By orders of Mr. Justice Brennan, dated March 6, 1967, and March 10, 1967, the time for filing a petition for certiorari was extended first to March 10, 1967, and then to March 27, 1967. The petition was filed on March 17, 1967.

The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, as a prerequisite to accepting air carrier tariffs setting forth motor vehicle pickup and delivery "services [to be provided] in connection with * * * air transportation" by the air carrier, within the meaning of Section 403(a) of the Federal Aviation Act, the Civil Aeronautics Board was re-

quired (a) to attempt to determine the status of the services under Section 203(b)(7a) of the Interstate Commerce Act, which exempts from ICC economic regulation motor transportation "incidental to transportation by aircraft", or (b) to await a Commission determination thereunder.

2. Whether, in determining to accept the tariffs, the Board's conclusion that the services described were "in connection with * * * air transportation" was based upon adequate and proper standards.

3. Whether the Civil Aeronautics Board in any event was required, prior to acceptance of the tariffs, to hold evidentiary hearings at the instance of motor carriers asserting competitive impact from the pickup and delivery services where (a) the statute requires none; (b) petitioners were given notice and an opportunity to present facts and argument in rebuttal to the matters set forth in the application for leave to file the tariffs; and (c) petitioners tendered no issues of material fact.

## STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 *et seq.*, Part II of the Interstate Commerce Act, 49 Stat 543, 49 U.S.C. 301 *et seq.*, the regulations of the Civil Aeronautics Board and those of the Interstate Commerce Commission are set forth in the appendices (1a–12a) of both petitions for certiorari.

## STATEMENT

These cases involve two orders issued by the Civil Aeronautics Board permitting Emery Air Freight

Corporation, a Board-licensed air freight forwarder,[2] to amend its air carrier tariffs so as to include pickup and delivery services to two points more than 25 miles from Boston and Detroit respectively. The tariff amendment contested in No. 989 provided for pickup and delivery service between Boston and Nashua, New Hampshire, located some nine miles beyond the perimeter of the 25-mile zone. The one involved in No. 1160 provided for such service between Detroit and Flint, Michigan, situated about 20 miles outside the 25-mile zone. Petitioners represent motor carrier interests in competition with Emery. In both cases, the Board found that the new points to be served were reasonably close to the principal cities and that, for purposes of air freight, each was, as a practical matter, a part of the area served by the airports of those larger cities. It also found that the proposed services would be rendered with equipment of the type traditionally used for pickup and delivery operations; that schedules would be closely coordinated with air schedules at the principal cities; and that rates were to be closely related to those charged for pickup and delivery services within the 25-mile zone. The Board

[2] Air freight forwarders are "indirect carriers" within the meaning of Section 101(3) of the Federal Aviation Act (49 U.S.C. 1301(3)) and hence require operating authority from the Board. They operate pursuant to a blanket exemption from the provisions of Section 401 of the Act (49 U.S.C. 1371), which requires air carriers to obtain certificates of public convenience and necessity as a condition precedent to lawful operation. See 14 C.F.R. 296. They are not, however, exempt from the tariff requirements of the Act. See generally *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (C.A. 7).

concluded that the services were pickup and delivery in character and properly includible in an air carrier tariff under Section 403(a) of the Federal Aviation Act (49 U.S.C. 1373(a)) as a "service in connection with * * * air transportation."

In order to perform a complete door-to-door service, air carriers engaged in the transportation of air freight have for many years held out to the public motor vehicle pickup and delivery services, performed either with their own trucks or under contracts with independent motor carriers who act as agents of the air carriers. Pursuant to Section 403(a) of the Act, which provides that, "to the extent required by regulations of the Board," air carrier tariffs shall show those "services in connection with * * * air transportation" which the carriers undertake to provide, the Civil Aeronautics Board requires air carriers to include in their tariffs whatever pickup and delivery services they offer. As a general rule, the Board has accepted tariffs without further inquiry if the pickup and delivery services were to be provided within a 25-mile radius of the point served by the air carrier.[3]

Motor carrier operations, of course, are generally subject to economic regulation by the Interstate Commerce Commission. However, Section 203(b)(7a) of the Interstate Commerce Act exempts from such regulation the "transportation of persons or property by motor vehicle when incidental to transportation by air-

[3] Tariffs to points well beyond the 25-mile zone were also filed and accepted, prior to the issuance of pertinent regulations in 1964 (see *infra*, pp. 6–7).

craft.". When the Board accepts for filing an air carrier's pickup and delivery service tariff, this is neither a license to conduct motor transportation nor a determination under Section 203(b)(7a) that no license is required. The Commission alone determines whether the motor vehicle operation is subject to the certification requirements of the Interstate Commerce Act or is exempt under Section 203(b)(7a).

In recognition of the fact that the provisions of Sections 203(b)(7a) and 403(a) of the respective Acts are interrelated, though not identical in scope, and in order to minimize the possibility of interagency conflict, the Board and the Commission cooperated in the issuance of formal regulations in 1964. The Board's regulation, 14 C.F.R. Part 222 (No. 1160, Pet. App. 10a–11a), dealt with tariffs already on file with it and new ones which might be filed in the future.[4] With respect to existing tariffs, including those showing service to places more than 25 miles from the certificated point, it provided for their continued effectiveness. With respect to future tariffs, it provided automatic authority for the filing of tariffs covering service to places within 25 miles of either the airport or the city limits of the certificated point, and established a procedure under which permission may be granted, upon application, to file new tariffs showing such service to points beyond the 25-mile zone. It is the Board's grant of two applications for such permission which is challenged in these cases.

[4] The opinion issued by the Board in promulgating its regulation is set forth in the Appendix to both petitions for certiorari, at pp. 6a–10a. The opinion promulgating the Com-

Under the Commission's regulation, 49 C.F.R. 210.40 (No. 1160, Pet. App. 3a–5a), motor transportation of property falls within the Section 203(b)(7a) exemption if (1) "it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier * * * providing the line-haul transportation, which terminal area * * * has been described in a tariff filed with and accepted by the Civil Aeronautics Board," and (2) "it is confined to the transportation of shipments which have been received from or will be delivered to a direct air carrier * * * as part of a continuous movement which * * * shall be provided for in tariffs filed with and accepted by the Civil Aeronautics Board, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier." Although the regulation thus continued the previous practice of treating as exempt those services described in air carrier pickup and delivery service tariffs on file with the Board, the Commission established a procedure under which, either on "its own motion or upon petition filed by any interested person," it could define for itself the boundaries of the terminal zone of a particular airport or city, "differing in extent from the terminal areas of * * * air carriers * * * as defined in tariffs filed with and accepted by the Civil Aeronautics Board" (No. 1160, Pet. App. 4a).

---

mission's regulation is reported as *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71.

260-688—67——2

In permitting Emery to file the tariff amendments here involved, the Board rejected a contention by petitioners that the applications should be dismissed because they failed to show that the transportation would be exempt from Commission regulation under Section 203(b)(7a). The Board held that it was for the Commission to determine whether the operations required authorization by it. Also rejected were petitioners' alternative request that evidentiary hearings be held as to each of these matters. The Board pointed out that hearings are not required by the pertinent statutory provisions, and that no issues of material fact had been developed, notwithstanding the fact that all parties had had full opportunity to submit whatever data they wished.

The first of the Board's orders, the one involving Nashua (No. 989), was affirmed by the Court of Appeals for the First Circuit. The court rejected petitioners' contention of procedural irregularity, holding that a hearing was not statutorily required, and that none was required as a matter of constitutional necessity, since petitioners' only interest stemmed from the increased competition which Emery would provide. On the merits, it found reasonable the factors upon which the Board relied in determining that the operation would be a pickup and delivery service in connection with air transportation within the meaning of the Federal Aviation Act. It pointed out that the regulations of the Board and the Commission reflect "a continuing accommodation between two independent agencies," while at the same time preserving

the independent authority of each to interpret and apply the provisions of the statute it administers. The court observed that petitioners had not sought a determination of the status of the service under the Interstate Commerce Act, and that "there is not even a conflict between administrative actions" (No. 989, Pet. App. 24a).

The second order, involving Flint, was affirmed by the Court of Appeals for the District of Columbia Circuit, in a *per curiam* decision, with one judge dissenting, on the basis of the First Circuit's earlier holding (No. 1160, Pet. App. 14a).

## ARGUMENT

These cases were correctly decided by the courts below, present no conflict of judicial or administrative decisions, and do not warrant review by this Court.

1. The Civil Aeronautics Board's determinations, upheld by both courts of appeals for the same reasons, involve no more than administrative approval of the contents of an air carrier's tariff. As the First Circuit observed, because of interagency cooperation and comity, there is no conflict between the Board and the Interstate Commerce Commission. Under its regulation and in the orders under review, the Board leaves to the Commission the question of the status of pickup and delivery services under the Interstate Commerce Act and recognizes that a certificate from the Commission would be necessary for the performance of the services if the Commission should determine that they are not exempt under Section 203(b)(7a). Moreover, the Commission's

regulation establishes a special procedure for determination by it, either upon petition or the Commission's own initiative, of this precise queston. Petitioners have not sought such a determination with respect to the pickup and delivery services here involved; nor has the Commission undertaken such an inquiry on its own initiative, notwithstanding that it is fully aware of the Board's actions.[5]

2. Petitioners' basic contention is that the Board's acceptance of a pickup and delivery service tariff under Section 403(a) is a "license" to engage in motor transportation, and hence that such a tariff can be accepted only if the service described therein is exempted by Section 203(b)(7a) from certification under the Interstate Commerce Act. However, in recognition of the fact that it is for the Commission to determine whether any motor vehicle operation requires its certification,[6] neither the Board's regulation nor the orders here involved purport to license motor transportation or to determine its status under the

[5] See the letter, set forth as an Appendix to this brief, from the General Counsel of the Interstate Commerce Commission to the Department of Justice with respect to this litigation. In this connection, we note petitioners' suggestion that this letter indicates the existence of inevitable interagency conflict (No. 1160, Pet. 20). Read in its entirety, however, the letter indicates precisely the opposite. We are authorized to state that the Interstate Commerce Commission concurs in the views expressed in the instant brief in opposition.

[6] See *Air Dispatch* v. *United States*, 237 F. Supp. 450 (E.D. Pa.), affirmed *per curiam*, 381 U.S. 412; *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770 (C.A.D.C.); *Wycoff Co.* v. *United States*, 240 F. Supp. 304 (D. Utah).

Interstate Commerce Act.[7] The Board simply decided that the motor transportation service described in the tariffs in question meets the standards of the Federal Aviation Act for an air carrier's tariff. It constitutes a service which the air carrier undertakes to provide; this service may or may not require operating authority from the Commission. Petitioner's remedy for testing this question lies in the Commission.

The courts below properly held that each agency has independent authority to interpret and apply its own statute (see the cases cited in note 6, *supra*). Actual experience has shown, moreover, that this does not create interagency conflict precisely because the Board recognizes the independence of the Commission with respect to the applicability of the Interstate Commerce Act.[8]

---

[7] As the Board said in its notice of proposed rulemaking (26 Fed. Reg. 8037), "[N]or does the Board specifically license or directly control the provision of such service. The exercise of Board authority has heretofore been confined to accepting or rejecting tariffs filed under Section 403(a) of the Act as providing service 'in connection with * * * air transportation.' Whether or not the surface transportation under the terms of a tariff may be lawfully performed depends primarily upon whether it is a service which is 'incidental to transportation by aircraft' under the Interstate Commerce Act and thus exempted pursuant to that statute." See also the Board's opinion promulgating the pickup and delivery service tariff regulation (No. 1160. Pet. App. 7a).

[8] If the Commission were to determine that the motor transportation described in an air carrier tariff on file with the Board required a license from the Commission and were to deny such a license, the carrier would, of course, be unable to provide the service and thus would have to cancel the tariff. This would not conflict with the Board's determination, however, which amounts to no more than that the service, *if provided*, is the

3. There is no merit to petitioners' challenge to the standards applied by the Board in implementing Section 403(a) and its own regulation thereunder. As the courts below held (No. 989, Pet. App. 24a), the Board's "formula [was] a combination of reasonably close communities where service is rendered in smaller trucks, closely tied in with air schedules, and where rates are geared to the smaller shipments." The Board relied upon the fact that, from a practical and operational point of view, the service was of a sort characteristic of air freight pickup and delivery service, and that it would be provided to points which were reasonably close to Boston and Detroit[9] and which were a part of the area served by the airports of those principal cities for air freight purposes.[10] Under these standards, the Board's decisions are

---

sort of service which must be described in the air carrier's tariff.

[9] We note the footnote contention of petitioners in No. 1160 (Pet. 6) that Flint is 65 to 80 miles from the Detroit airports, depending on the route used. This overlooks the fact that, in computing distances for pickup and delivery service purposes under the Board's regulation, either the airports or the city limits of the point in question are used (No. 1160, Pet. App. 10a). We also note in this connection that Metropolitan Airport, the closer of the two Detroit airports, is approximately 17 miles southwest of the city. If it were located a similar distance to the northwest of the city, Flint would be barely three miles beyond the 25-mile zone.

[10] The contention that the Board's findings lack adequate factual support plainly does not call for this Court's consideration. It relates, moreover, largely to the alleged lack of showing of a "nexus" between Detroit and Flint. The carrier's application, however, set forth facts which, in sum, showed that, for air freight purposes, Flint was essentially a satellite of Detroit.

plainly supported by substantial evidence. As the First Circuit observed, this approach is "not unreasonable for an agency mandated to develop air transportation."[11] It is therefore entitled to respect by the courts. *Udall* v. *Tallman*, 380 U.S. 1, 4. That respect was properly accorded by the courts below.

4. As to petitioners' contention that the Board was required to hold evidentiary hearings, it is immaterial whether its actions are viewed as rulemaking or adjudication. Assuming them to have been the latter, no hearings were required. In contrast to numerous other provisions, Section 403(a) contains no requirement for a hearing prior to Board action thereunder. The courts below properly concluded that the express requirement of a hearing in numerous sections of the Act and the absence of such a requirement in others indicate that the "legislative omission was significant," and that a hearing is not necessary unless specifically directed.[12] Moreover, as the courts below properly found, petitioners raised no issues of material fact in their oppositions to the applications. See *Railway Express Agency* v. *Civil Aeronautics*

[11] The Board is under an affirmative statutory directive (49 U.S.C. 1302) to promote and develop air transportation, including air freight. See *American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C.). It was pursuant to this directive that the Board promulgated its pickup and delivery service tariff regulation (see Pet. App. 8a).

[12] *American Trucking Associations* v. *United States*, 344 U.S. 298, 319, 320; *Nebraska Department of Aeronautics* v. *Civil Aeronautics Board*, 298 F. 2d 286, 292 (C.A. 8); *Eastern Airlines* v. *Civil Aeronautics Board*, 185 F. 2d 426, 427 (C.A.D.C.), vacated as moot, 341 U.S. 901.

*Board,* 345 F. 2d 445 (C.A.D.C.), certiorari denied, 382 U.S. 879; *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* No. 20,350, C.A.D.C., decided February 28, 1967.[13]

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General,*
DONALD F. TURNER,
*Assistant Attorney General,*
HOWARD E. SHAPIRO,
*Attorney.*

JOSEPH B. GOLDMAN,
*General Counsel,*
O. D. OZMENT,
*Deputy General Counsel,*
WARREN L. SHARFMAN,
*Associate General Counsel,*
ROBERT L. TOOMEY,
*Attorney,*
*Civil Aeronautics Board.*

APRIL 1967.

[13] We note that the affidavit filed in opposition to the application involved in No. 1160 raised no more than a question as to whether the proposed service could be "economically or efficiently" performed.

# APPENDIX

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
*Washington, D.C. 20423,* LSG:ch, *March 28, 1966.*

Re: *National Motor Freight Traffic Association, Inc., et al.* v. *Civil Aeronautics Board,* C.A.D.C. No. 19953.

HOWARD E. SHAPIRO, Esq.,
*Assistant Chief, Appellate Section, Antitrust Division, Department of Justice, Washington, D.C. 20530.*

DEAR MR. SHAPIRO: In your letter of March 21, 1966, you requested our comments on the petition for review of the Board's order of December 6, 1965, in the above case. By this order the Board permitted Emery Air Freight Corporation, an air freight forwarder, to file tariffs governing motor carrier service from Detroit airports to Flint, Michigan, a distance of 45 miles.

The petitioner in the Court of Appeals is the tariff-filing agent of most of the major motor common carriers of property in the United States. It argues, 1) the Board is without authority to accept Emery's tariff for filing, for such tariff permits a motor carrier operation beyond a reasonable terminal area of the Detroit airports without any operating authority from the Interstate Commerce Commission; and 2) the Board's finding that Emery's operation is a bona fide pickup and delivery service is not supported by substantial evidence. I believe that the Board's decision presents no conflict with the jurisdiction of this Commission.

The effect of the Board's decision is to permit Emery to file a tariff under the applicable standards of Section 403(a) of the Federal Aviation Act, 49 U.S.C. § 1373(a). The Board has found that in its view Emery will provide a bona fide pickup and delivery "service in connection with * * * air transportation," in the language of Section 403(a). It expressly refused "to reflect any views on whether applicant [Emery] or its motor carrier agent requires additional authority from the I.C.C. or other regulatory agencies." Order of December 6, 1965, p. 4, note 5.

The Board's present order is similar to the decision sustained in *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770 (D.C. Cir. 1961), where the Board decided that an airline could use a motor carrier to perform "air transportation" under an air carrier certificate without deciding whether the airline or its motor carrier agent needed additional authority from the Interstate Commerce Commission to perform the motor carrier service. The Board was sustained in the Court of Appeals essentially on the grounds, which also apply to the present case, that the Board is not precluded from deciding whether a motor carrier operation complies with the requirements of the Aviation Act although the operation may not be in compliance with the requirements of the Interstate Commerce Act. Whether a particular motor carrier operation is exempt from the latter act under Section 203(b)(7a), 49 U.S.C. § 303(b)(7a), is in either event for this Commission to decide.

Moreover, in the present case the petitioner has other specific administrative remedies available to it, if it believes Emery is operating beyond the exemptions of Section 203(b)(7a). The Board acted pursuant to 14 CFR Part 222 in accepting Emery's

tariff for filing. These rules were adopted concurrently with ICC regulations (49 CFR 210.40(c)) which provide for individual determination of exempt zones under Section 203(b)(7a), *after* the CAB has acted. Petitioner, therefore, may file a petition with the Commission requesting it to determine appropriate boundaries for the exempt zone(s) around the Detroit airports which may differ in extent from the terminal area defined in tariffs accepted by the CAB. If the ICC should decide that for purposes of Section 203(b)(7a) the terminal area around the Detroit airports cannot be as large as the terminal area satisfying Section 403(a) of the Aviation Act, presumably Emery will have to obtain appropriate ICC operating authority to perform that part of its motor service which is not exempt from the Interstate Commerce Act.

The petitioner may argue in the pending litigation that the Board's action, without the concurrence of the ICC, creates a potential conflict in their respective jurisdictions, for basic to both Section 403 and 203(b)(7a) is a determination of whether Emery is performing a bona fide pickup and delivery service. If it is performing such a service, then its motor carrier operation will be both, "in connection with" air transportation (under Section 403(a) of the Aviation Act) and "incidental" to transportation by aircraft (under Section 203(b)(7a) of the Interstate Commerce Act).

The draftsmen of the CAB and ICC regulations in this area foresaw the potential "conflict". The Board, for example, stated the following in adopting Part 222 (29 F.R. 6276):

> Subsequent acceptance by the Board of air cargo pickup and delivery tariffs under these standards would not, of course, interfere with the freedom of the ICC to determine whether

the related motor transportation did or did not come within the section 203(b)(7a) exemption. The Board anticipates, however, that the ICC will give due and appropriate weight to the Board's findings and that the contemplated services are, truly air cargo pickup and delivery in nature, as it does today.

We may assume, therefore, that although the Board has found Emery is providing a bona fide pickup and delivery service, the Commission may not so find. The Commission will, of course, give weight to the Board's decision, but will not be bound by that decision. Both the Board and ICC decisions must be supported by substantial evidence, and it is not unusual that substantial evidence may support more than one result on the same record. See *Consolo* v. *Federal Maritime Commission,* No. 63, U.S.S. Ct. p. 12 of slip opinion, decided March 22, 1966, and cases cited. I, of course, cannot now say whether the Commission would give the same weight to each of the factors that convinced the Board that Emery is providing a bona fide pickup and delivery service between Detroit and Flint; nor do I comment on whether the Board's finding is supported by substantial evidence.

I hope you will find the foregoing comments helpful.

Yours very truly,

(S) Robert W. Ginnane,
ROBERT W. GINNANE,
*General Counsel.*

U.S. GOVERNMENT PRINTING OFFICE: 1967